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Supreme Court, U.S.
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No. 03-

In the Supreme Court of the United States

Jean Brooks-Powers,
As the Surviving Spouse and Administratrix of the Estate of
Her Deceased Husband,
John Walter Powers,
Petitioner

v.

Metropolitan Atlanta Rapid Transit Authority,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case represents the confluence of two areas of law important to this Court: 'implied private right of action' doctrine and 42 U.S.C. 1983 law. The questions presented are as follows:

1. Does the Urban Mass Transportation Act, 49 U.S.C. §§ 5329, 5330, and regulations promulgated thereunder, provide an implied private right of action against a governmental transit agency subject to the Act in favor of the survivors and estate of a transit worker killed as a result of the transit agency's failure to comply with the Act and its accompanying regulations.

2. Does the principle of federal preemption of state law apply in determining whether the Urban Mass Transportation Act, 49 U.S.C. §§ 5329, 5330, and regulations promulgated under those provisions, provide an implied private right of action against a transit agency subject to the Act.

3. Does 42 U.S.C. § 1983 provide a remedy in favor of the survivors and estate of a deceased transit worker and against a transit agency for the death of the transit worker caused by a transit agency's violation of (a) the transit worker's substantive due process rights under the Fourteenth Amendment to the United States Constitution; (b) the transit worker's federal statutory rights under the Urban Mass Transportation Act, 49 U.S.C. 5329 and 5330, and the regulations promulgated thereunder at 49 C.F.R. Part 659.

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PETITION FOR A WRIT OF CERTIORARI

Jean Brooks- Powers respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Georgia in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia (App. A, *infra*, 1a-13a) is reported at *Brooks-Powers v. Metropolitan Atlanta Rapid Transit Authority*, 206 Ga. App. 390, 579 S.E.2d 802 (2003). The order of the Supreme Court of Georgia (App. C, *infra*, 17a) denying a writ of certiorari to the Court of Appeals of Georgia and the decision of the trial court (App. B, *infra*, 14a-16a) are unreported.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on March 19, 2003. Petitioner requested the Supreme Court of Georgia issue a writ of certiorari to the court of appeals. The Supreme Court of Georgia denied petitioner's request in an order entered on July 14, 2003 (App. C, *infra*, 17a). Petitioner has timely petitioned this Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Urban Mass Transportation Act, 49 U.S.C. 5301 *et seq*, and of Part 659 of Title 49 of the Code of Federal Regulations, are reproduced in Appendix E to this petition (App. E, *infra*, 38a-52a).

United States Code Title 42, Section 1983 and Section 1 of the Fourteenth Amendment to the United States Constitution are reproduced below (App. E, *infra*, 37a-38a).

STATEMENT

Petitioner filed suit in the Superior Court of Fulton County, Georgia against respondent, transit agency, seeking damages for the death of her husband, a transit worker, who was struck and killed by a train owned and operated by the respondent.[1] At the time of his death, petitioner's husband was in the course and scope of his employment with the respondent. In her suit petitioner pleaded a private cause of action for the death of her husband under the Urban Mass Transportation Act (UMTA) (App. D, *infra*, 30a-31a). Additionally, in her suit, petitioner sought relief under 42 U.S.C. 1983 for violation of her husband's substantive due process rights secured by the Fourteenth Amendment to the United States Constitution and for violation of his federal statutory rights under the UMTA and regulations promulgated under the UMTA (App. D, *infra*, 31a-34a).

After answering petitioner's complaint, respondent moved for summary judgment as to petitioner's claims. The trial court granted respondent's motion for summary judgment (App. B, *infra*, 14a-16a). Petitioner appealed to the Court of Appeals of Georgia. That court affirmed the trial court in an opinion (App. A, *infra*, 1a-13a) reported at *Brooks-Powers v. Metropolitan Atlanta Rapid Transit Authority*, 206 Ga. App. 390, 579 S.E.2d 802 (2003).

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[1] Petitioner's complaint as filed in the state court is reproduced in Appendix D to this petition without the exhibits that were attached to the complaint at the time of its filing (App. D, *infra*, 18a-36a).

In affirming the trial court, the Court of Appeals of Georgia held that the UMTA did not provide petitioner a private cause of action for the death of her husband (App. A, *infra*, 4a-9a). In addition, the Georgia court held that 42 U.S.C. 1983 did not provide petitioner a remedy for the death of her husband (App. A, *infra*, 9a-11a).

Petitioner requested a writ of certiorari from the Supreme Court of Georgia to the Court of Appeals of Georgia to review the court of appeal's decision. The Supreme Court of Georgia denied petitioner's request (App. C, *infra*, 17a).

1. John Power's Death

Respondent, Metropolitan Atlanta Transit Authority ("MARTA") is a state-created local public authority that operates a public transportation system in the metropolitan Atlanta, Georgia area (App. A, *infra*, 3a). On February 25, 2000, MARTA employed John Powers as an Automatic Train Control technician (App. D, *infra*, 20a). On that date John Powers and a co-worker were ordered by MARTA to perform track inspections at MARTA's Avondale Estates Station (App. D, *infra*, 20a). John Powers requested and received the necessary authorization and clearance for him and his co-worker prior to beginning their work on the tracks (App. D, *infra*, 20a).

As John Powers and his co-worker worked on the MARTA tracks, a MARTA train traveling at an estimated 25 miles per hour ran into them (App. D, *infra*, 20a). The force and impact of the collision resulted in the death of John Powers, who was run over and crushed by the train, as he worked on the tracks (App. D, *infra*, 21a). His co-worker

was severely injured and suffered from a partial amputation of a foot, a broken knee, punctured and collapsed lung, broken vertebra and a head injury (App. D, *infra*, 21a).

John Powers was survived by his spouse Jean Brooks-Powers (petitioner), two sons from a prior marriage and a minor girl he was in the process of adopting.

2. The Cause of John Power's Death

MARTA appointed an ad hoc Accident Investigation Board after the death of John Powers to review the incident and make findings and recommendations. The Accident Investigation Board concluded, *inter alia*, that MARTA had no written safety procedures at the time of the fatal incident regarding the type of inspections being conducted by John Powers and his co-worker (App. D, *infra*, 26a). Moreover, the Accident Investigation Board concluded MARTA did not require its train operators to have notice of restrictions regarding the presence of workers on or about the track area (App. D, *infra*, 26a-27a). The train operator received no notice prior to the accident that John Powers and his co-worker were conducting inspections on the railway at the Avondale Station (App. D, *infra*, 22a). In addition the Accident Investigation Board found that the train operator failed to stop the train in an appropriate manner (App. D, *infra*, 26a), but that even if the train had been stopped as preferred under MARTA procedures the fatal collision would not have been avoided.

Prior to the fatal incident involving John Powers, MARTA, knew or should have known that the operator of the train that struck John Powers was not qualified and capable of performing as a train operator, without

jeopardizing the lives and safety of MARTA workers and passengers. MARTA records from before the fatal incident showed that the operator of the MARTA train that struck and killed John Powers had a history of driving infractions while both a bus operator and train operator for MARTA (App. D, *infra*, 23a-25a); *see also,* (App. A, *infra*, 2a fn2). These included at least two instances prior to John Powers' death of the potentially deadly infraction of running a red light while a operating a MARTA train (App. D, *infra*, 25a) and (App. A, *infra*, 2a). However, MARTA authorized and permitted this train operator to operate a MARTA train, putting at risk the safety of MARTA employees and passengers (App. D, *infra*, 32a-33a).

Less than one month after John Powers was run over and killed, a father and a son working as contractors for MARTA were struck and killed by another MARTA train while working at MARTA's Lenox Station (App. D, *infra*, 30a). Newspaper accounts of both fatal incidents revealed that "MARTA officials were warned in September [1999] that their employees' safety was compromised by outdated procedures, a caution delivered months before trains killed three workers and seriously injured another." (App. D, *infra*, 30a).

3. MARTA and the UMTA

As a transit agency receiving federal funds, MARTA is subject to the provisions of the UMTA, 49 U.S.C. 5301, *et seq.*, and regulations promulgated under the UMTA at 49 C.F.R. Part 659. An express purpose of the UMTA, as stated by Congress, is "to assist in developing mass transportation equipment, facilities, techniques, and methods ...". 49 U.S.C. 5301(f)(1). To that end Congress included in the UMTA at

the time of John Power's death safety provisions for the benefit of transit workers (and transit passengers). 49 U.S.C. 5329 and 5330. Regulations promulgated under the UMTA further reflect the concerns for transit employee (and passenger) safety. 49 C.F.R. Part 659.

Congress' concern about the safety of transit workers is apparent from the face of the UMTA. Section 5329 of the UMTA, entitled "Investigation of safety hazards", permits the Secretary of Transportation to investigate any "condition in equipment, a facility, or an operation ... that ... causes a serious hazard of death or injury"; and permits the withholding of federal funds if a transit agency fails to address such safety hazards. 49 U.S.C. 5329(a). Transit employee deaths and injuries were of such concern that Congress specifically required the Secretary of Transportation to submit a report including "a summary of all employee-related deaths and injuries arising from an unsafe condition in a facility, equipment, or way of operating a facility or equipment...". 49 U.S.C. 5329 (b)(4).

Additionally, the UMTA requires each State to establish and carry out a safety program for each of its mass transportation systems that "establishes at least safety requirements, lines of authority, levels of responsibility and accountability, and methods of documentation for the system". 49 U.S.C. 5330(c)(1). Moreover, the UMTA requires the designation of a State authority having responsibility "to investigate hazardous conditions and accidents on the [mass transportation] systems; and ... to require corrective action to correct or eliminate those conditions." 49 U.S.C. 5330(c)(2).

Regulations promulgated by the Federal Transit Administration pursuant to the authority of 49 U.S.C. 5330 further reflect the intent to protect transit workers from death or serious injury as result of transit agency operations. For example, the regulations define an "accident" to include an event involving a transit train in which a person dies. 49 C.F.R. § 659.5 Under the regulations a transit agency must implement a 'system safety program plan' that "address the personal security and safety of its passengers and employees." 49 C.F.R. §§ 659.31(a)(2) and 659.33(a)(1) A "[*s*]*ystem safety program plan* means a document adopted by the transit agency detailing its safety policies, objectives, responsibilities, and procedures". 49 C.F.R 659.5 The regulations contain requirements that a transit agency conduct annual safety audits; report on accidents and unacceptable hazardous conditions; and, take corrective action as to hazardous conditions. 49 C.F.R. 659.35 - .43.

Approximately five months prior to the incident that killed John Powers, MARTA had been warned by a consultant retained by MARTA to review its procedures that MARTA's outdated procedures compromised the safety of its employees (App. D, *infra*, 30a).

4. John Power's Widow and Estate Files Suit

Petitioner, Jean Brooks-Powers, filed suit against MARTA in her individual capacity and her capacity as the representative of John Powers' estate (App. D, *infra*, 18a). The suit was filed in the Superior Court of Fulton County, Georgia (App. D, *infra*, 18a).

In her suit Jean Brooks-Powers specifically alleged a cause of action against MARTA under the UMTA, 49 U.S.C.

5329 and 5330, and accompany regulations at 49 C.F.R. Part 659 (App. D, *infra*, 30a-31a). Additionally, Jean Brooks-Powers alleged a right to relief under 42 U.S.C 1983 on two bases: (1) for violation her husband's substantive due process rights secured by the Fourteenth Amendment to the United States Constitution and (2) for violation of his federal statutory rights under the UMTA and regulations promulgated under the UMTA (App. D, *infra*, 31a-34a). The constitutional right violated was John Powers' substantive due process right to be free from conduct by a governmental employer that recklessly or with deliberate indifference exposed him to an unreasonable risk of harm (App. D, *infra*, 31a-34a). The federal statutory rights violated were for MARTA's knowing failure to have an adequate safety plan and procedures as required by UMTA 49 U.S.C. 5329 and 5330 and the regulations at 49 C.F.R. Part 659 (App. D, *infra*, 31a-34a).

Jean Brooks-Powers' suit sought compensatory and punitive damages for the death of her husband; and, she sought equitable relief requiring MARTA to implement a safety plan in compliance with the UMTA (App. D, *infra*, 35a-36a).

5. The Lower Courts' Decisions

After filing an answer to Jean Brooks-Powers lawsuit, MARTA filed a motion in the trial court seeking summary judgment as to all of Jean Brooks-Powers claims. The trial court granted summary judgment to MARTA on all of Jean Brooks-Powers' claims (App. B, *infra*, 14a-16a). The trial court's judgment was appealed to the Court of Appeals of Georgia. The state appellate court affirmed the trial court's grant of summary judgment in favor of MARTA (App. A,

infra, 1a-13a). Without opinion, the Supreme Court of Georgia denied Jean Brooks-Powers petition for that court to issue a writ of certiorari to the Court of Appeals of Georgia to review its judgment (App. C, *infra*, 17a).

In its opinion affirming the grant of the summary judgment to MARTA, the Court of Appeals of Georgia characterized Jean Brooks-Powers' suit based on federal constitutional and statutory law as "an apparent effort to circumvent the exclusivity provision of [a] state law, [the Georgia Workers' Compensation Act] ..." (App. A, *infra*, 3a).

The Georgia court then went on to hold that provisions of the UMTA, 49 U.S.C. 5329 and 5330, and 49 C.F.R. Part 659, did not provide an implied private right of action for the death of John Powers (App. A, *infra*, 9a). In its analysis of the issue, the Georgia court felt that a question of federal preemption of a state law, Georgia Workers' Compensation Act, was involved. The court concluded Congress did not intend to preempt the state workers' compensation laws (App. A, *infra*, 5a).

As to Jean Brooks-Powers claims for relief under Section 1983, the Court of Appeals of Georgia made no differentiation between the her claims of violation of John Powers substantive due process right under the Fourteenth Amendment and the violation of his rights under the UMTA, 49 U.S.C. 5329 and 5330 and the regulations promulgated thereunder (App. A, *infra*, 9a-11a).

The Georgia court's opinion is couched only in terms of the claim of a violation of a substantive due process right (App. A, *infra*, 9a-11a). The Georgia court erroneously

characterized the constitutional right alleged to have been violated as a "substantive due process right to a safe working environment separate from and beyond the framework of workers' compensation laws." (App. A, *infra*, 9a). The court held that "the conduct of MARTA, while arguably negligent, did not constitute deliberate behavior 'intended to injure in some way unjustifiable by any government interest'[quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)]." (App. A, *infra*, 11a). The Georgia court offered no analysis of the claim under Section 1983 for a violation of John Powers' rights under the UMTA, 49 U.S.C. 5329 and 5330, and the regulations issued thereunder.[2]

REASONS FOR GRANTING THE PETITION

This case presents a confluence of important issues that this Court has not yet addressed or that are issues on which this Court needs to provide clarification.

First, this Court has not addressed whether the provisions of the UMTA at 49 U.S.C. 5329 and 5330, and the regulations promulgated thereunder, provide an implied right

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[2] The Court of Appeals of Georgia also affirmed the trial court's ruling that allowed MARTA to amend its answer to Jean Brooks-Powers lawsuit so as to deny allegations contained in the lawsuit, which MARTA had initially admitted, that "'Congress enacted the [UMTA] for the purpose of protecting the rights and safety of rail transit workers, such as' [John] Powers"; and "the UMTA 'was designed to improve the safety and security of mass rail transportation systems as a result of a growing concern of Congress to prevent catastrophic accidents involving the employees and passengers of rail transportation systems.'" (App. A, *infra*, 11a-13a) The Georgia court also affirmed the trial court's ruling that the initial admissions by MARTA were of no evidentiary value in ruling on MARTA's motion for summary judgment (App. A, *infra*, 11a-13a)

of action for the death (or injury) of a transit agency employee. In addition, this case presents the important question of whether the principle of federal preemption plays any role in determining whether a federal statute and regulations thereunder create an implied private right of action.

Second, this case provides the Court the opportunity to clarify that its decisions in *Collins v. City of Harker Heights,* 503 U.S. 115 (1992) and *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) permit a Section 1983 claim for a substantive due process violation caused by a local governmental entity's deliberate indifference manifested by its deliberate policies and procedures that place its employees in positions of unreasonable risk of harm.

Third, this case presents the important question of whether the provisions of the UMTA at 49 U.S.C. 5329 and 5330, and the regulations promulgated thereunder at 49 C.F.R. Part 659, give rise to rights the violation of which support a claim under 42 U.S.C. 1983. Additionally, this case presents the opportunity to address uncertainty created by this Court's recent decision in *Gonzaga University v. Doe,* 536 U.S. 273.

1. UMTA, 49 U.S.C 5329 and 5330, and the accompany regulations at 49 C.F.R. Part 659 create an implied private right of action.

The Court of Appeals of Georgia held that the UMTA, 49 U.S.C 5329 and 5330, and the accompany regulations at 49 C.F.R. Part 659 do not create a private right of action for the death of, or catastrophic injuries to, a transit agency employee. *Brooks-Powers, supra* at 579 S.E. 2d 804-

806. This issue has not been addressed by this Court or any other federal court. On this important issue of federal law the judgment of an intermediate state appellate court should not stand as the sole pronouncement.

Also, the Georgia Court of Appeals held that in determining whether the provisions of the UMTA, 49 U.S.C. 5329 and 5330, and 49 C.F.R. Part 659, provide a private right of action for the death of John Powers "the principle of preemption" must be considered, *Brooks-Powers, supra* at 579 S.E. 2d 802, 805. In doing so the Georgia court has created dangerous precedent by interjecting into the analysis of the private right of action issue the principle of federal preemption not heretofore recognized by this Court as having bearing on the issue of whether a federal statutory scheme creates an implied private right of action.

2. A Section 1983 claim exists for violation of John Powers' substantive due process rights under the Fourteenth Amendment.

This case provides the Court the opportunity to clarify that its decisions in *Collins v. City of Harker Heights,* 503 U.S. 115 (1992) and *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) permit a Section 1983 claim for a substantive due process violation caused by a local governmental entity's deliberate indifference manifested by its deliberate policies and procedures that place its employees in positions of unreasonable risk of harm.

In *Collins* a municipal worker died of asphyxia while working in a municipal sewer. *Collins, supra* at 117. His widow filed suit against the municipality alleging, *inter alia,* a claim for violation of his substantive due process rights under the Fourteenth Amendment. *Id.* In *Collins* this Court

recognized that the "Due Process Clause of the Fourteenth Amendment ... afford[s] protection to employees who serve the government as well as those served by them, and § 1983 provides a cause of action for all citizens injured by an abridgment of those protections." *Id* at 120.

Collins' widow alleged in her complaint only the "general allegation that the city deprived him of life and liberty by failing to provide a reasonably safe work environment". *Id* at 125 – 126. Under the circumstances in *Collins*, this Court held that substantive due process under the Fourteenth Amendment's Due Process Clause does not impose a duty on a city to provide its employees with minimal levels of safety and security. *Id* at 126-127. Additionally, this Court held that "the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that [cannot] properly be characterized as arbitrary, or conscience shocking in the constitutional sense." *Id*. at 128.

In contrast to *Collins*, in the present case the substantive due process right under the Fourteenth Amendment alleged is that a governmental transit agency employee has a right not to be compelled to work on railroad tracks with trains in operation when procedures are not in place to notify train operators that persons are working on the tracks, and when policies permit a train operator with numerous train operation safety violations to operate a train. Such a right goes far beyond a claim of a mere generalized right to a safe work place. As such the Court of Appeals of Georgia misapplied *Collins* and erred in holding that Jean Brooks-Powers complaint did not allege a constitutional right under the Due Process Clause of the Fourteenth Amendment. *Compare, Brooks-Powers, supra.*

In *County of Sacramento v. Lewis, supra,* a case involving claim brought under § 1983 for a death as result of a high speed police case, this Court held that a police officer does not violate "the Fourteenth Amendment's substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender ... [I]n such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation". *County of Sacramento, supra,* at 836. In its analysis of the issue this Court recognized that "[d]eliberate indifference that shocks the conscience in one environment may not be so patently egregious in another..." *Id* at 850. An important factor this Court articulated is the opportunity government officials had to make unhurried judgments (compared to near instantaneous judgments under exigent circumstances). *See, id* at 853. "When ... extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Id.*

In the present case MARTA's existing policy of not requiring train operators to be notified of MARTA employees working on the train tracks, combined with the considered action of allowing a person with a known history of train operation safety violations to operate a train, presents just such 'an extended opportunity to do better' with a 'protracted failure to even care' that demonstrates indifference that is truly shocking in the constitutional sense. *See, id.*

This Court's decisions in *Collins* and *County of Sacramento* warrant clarification since the Georgia Court of

Appeals misconstrued both cases and erred in applying them to bar Jean Brooks-Powers' claim for relief under Section 1983 for the violation John Powers' substantive due process afforded by the Fourteenth Amendment.

To guide the citizenry in their conduct, and guide lower courts in addressing claims under 42 U.S.C. 1983 for substantive due process violations, the Court in this case has the opportunity to address the factors to consider when determining whether conduct that is deliberately indifferent amounts to arbitrary conduct that shocks the conscience in a constitutional sense.

3. A Section 1983 claim exists for violation of John Powers' statutory rights under the UMTA

This case presents the important question of whether the provisions of the UMTA at 49 U.S.C. 5329 and 5330, and the regulations promulgated thereunder at 49 C.F.R. Part 659, give rise to rights the violation of which support a claim under 42 U.S.C. 1983. Jean Brooks-Powers suit against MARTA alleged that the UMTA, Sections 5329 and 5330, and the accompanying regulations at 49 C.F.R. Part 659, endowed John Powers with rights that MARTA violated resulting in his death. Further, Jean Brooks-Power claimed that 42 U.S.C. 1983 provided a remedy for MARTA's violation of those rights. The Georgia Court of Appeals decision does not discuss Jean Brooks-Powers' claim that the UMTA provisions and regulations created rights the violation of which gives rise to an action Section 1983 (App. A, *infra*, 1a-13a). However, in affirming the grant of summary judgment as to all of Jean Brooks-Powers' claims asserted in her suit against MARTA, the Georgia court thereby adjudged that no valid claim under Section 1983 existed for the

violations of the UMTA provisions and regulations alleged in the suit against MARTA.

After *Gonzaga University v. Doe,* 536 U.S. 273 (2002), it is uncertain if a difference exists in the analysis to be applied by courts in determining if an implied right of private action exists under a federal statute, and in determining if a federal statute, and regulations promulgated under the statute, create a right that can serve as the basis of a claim under 42 U.S.C. 1983.

This case presents the opportunity to address whether Congressional and regulatory safety provisions contained in the UMTA, which directly speak to concerns for individual transit agency employee deaths and catastrophic injuries suffered as a result of transit agency equipment and operations create liberty interests or rights for individual transit workers the violation of which can serve as a basis of claim under Section 1983. In *Gonzaga University* this Court was not presented with Congressional and regulatory enactments having as their purpose protection from death or bodily injury a particular class of persons. *See, Gonzaga University, supra.*

This case presents those circumstances. The issues presented in this case are of great importance to a significant group of governmental workers: employees of mass transit agencies subject to the provisions on of the UMTA and its regulations, transit workers like John Powers and deserve this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Court of Appeals of Georgia reversed.

Respectfully submitted.

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October 2003

APPENDIX A

In the Court of Appeals of Georgia

A02A2448 BROOKS-POWERS et al. v. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY

March 19, 2003

Before: FOURTH DIVISION
SMITH, C. J., ELDRIDGE and ELLINGTON, JJ.

SMITH, Chief Judge.

After an employee of the Metropolitan Atlanta Rapid Transit Authority (MARTA) died in an on-the-job accident, Jean Brooks-Powers, as sole surviving spouse and as the Administratrix of the decedent's estate, sued MARTA for damages citing federal statutory and constitutional law. Following the grant of summary judgment to MARTA, Brooks-Powers filed this appeal which poses three legal questions: whether Brooks-Powers obtained an implied right to sue under 49 USC §§ 5329 and 5330 of the Urban Mass Transportation Act (UMTA); whether she had a cause of action under the federal Due' Process Clause; and whether a particular part of MARTA's answer constituted an admission in judicio. In ruling in favor of MARTA., the trial court

answered all three questions of law in the negative, and so do we.[1]

The following facts are not in dispute. On the morning of February 25, 2000, John Walter Powers was conducting an inspection of a segment of track located just outside the Avondale MARTA station. Prior to commencing work, Powers obtained clearance for him and his co-worker, Raymond Taylor to inspect that area of track. At approximately 8:12 am., a MARTA train operated by Jennifer Armour suddenly slammed into the men, killing Powers and grievously injuring Taylor. Armour had a, history of driving infractions that included two red light violations while operating a MARTA train.[2] An ad hoc accident investigation board conducted an investigation into the fatal incident and submitted recommendations for safety improvements.

On March 14, 2001, Brooks-Powers filed a notice of claim with the State Board of Workers' Compensation to obtain death benefits. MARTA's manager of claims, Donna Jennings, stated in an affidavit that the accident was accepted as compensable by the State Board of Workers' Compensation. Jennings also testified that " [a]s of April 4, 2002, MARTA has paid workers' compensation funeral

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[1] We owe no deference to a trial court's ruling on questions of law and review such issues *de novo. Suarez Y. Halbert,* 246 Ga. App. 822, 824(1), 543 S.E.2d 733 (2000).

[2] Information obtained under the Georgia Open Records Act revealed that Armour, a 12 year MARTA employee, had amassed five traffic violations while a bus driver and four additional violations while a train operator. MARTA terminated her employment after this fatality but under a settlement agreement engineered by the Amalgamated Transit Union, she was reinstated and reassigned.

expenses of $4,336.50 and paid weekly workers' compensation income benefits totaling $38,500.00 to the beneficiaries who have cashed workers' compensation checks."

By law, MARTA is a state-created local public authority and is subject to the provisions of the Georgia Workers' Compensation Act. *Williams v. MARTA,* 247 Ga. App. 52, 542 S.E.2d 199 (2000). "Where the Act is applicable, its *provisions* are the: exclusive remedy for the employee against the employer.... The exclusivity provision is the bedrock of the workers' compensation system." (Citation and footnote omitted.) *Doss v. Food Lion,* 267 Ga. 312-313(1), (2), 477 SE2d 577 (1996). While providing protection to injured employees, the Act expressly states that it is the injured worker's exclusive remedy. Subsection (a) of OCGA § 34-9-11 provides in applicable part: "The rights and the remedies granted to an employee by this chapter shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents, or next of kin, at common law or otherwise, on account of such injury, loss of service, or death." Absent an indemnification agreement or a statutory provision making an exception to the exclusive remedy provision, the workers' compensation system relieves employers not only of common law liability, but also of statutory liability toward their employees. See *Flint E .M C. v. Ed Smith Constr. Co.,* 270 Ga. 464, 465-466, 511 SE2d 160 (1999).

In an apparent effort to circumvent the exclusivity provision of this state law *Brooks-Powers* relies upon federal constitutional and statutory law and alleges that MARTA violated §§ 5329 and 5330 of the UMTA. Asserting a right to bring a private action under the UMTA, the lawsuit alleges

that "MARTA's failure to comply with security and safety policies, provisions and regulations of the Urban Mass Transportation Act was the direct and proximate [cause] of the death of JOHN WALTER POWERS." In addition, relying on 42 USC § 1983, the suit asserts that Powers' federally protected constitutional rights were violated when he was deprived of a substantive due process right to a safe working environment under the UMTA.. Finding that the UMTA did not include an implied right of action and also rejecting the substantive due process argument, the trial court granted summary judgment to MARTA. This appeal ensued.

1. Brooks-Powers contends that the trial court erred in granting summary judgment because federal law permits a private right of action by a transit worker for catastrophic injuries that result from the failure of a transit agency to comply with federal safety standards. She claims that the trial court failed to consider three federal cases, particularly *Area Transp., Inc. v. Ettinger, 75* F.Supp.2d 862, 864 (ND Ill. 1999). But Brooks-Powers fails to show that Ettinger, supra, or the other federal cases has any application here.

In *Ettinger,* a school bus company, Area Transport, sued Joel P. Ettinger, the: regional manager of the Federal Transit Administration, claiming that its competitor, Flint Transport, was receiving federal grant money in violation of 49 CFR § 605 (concerning school bus operations). Concluding that Area Transport lacked standing, id. at 867, the district court dismissed the suit. In dicta, however, the district court noted:

> The legislative history and statutory construction of the Urban Mass Transit Act ("UMTA") suggest that its general regulatory scheme was designed to benefit the public at large and not to create a special benefit for a

> particular class of persons. However, some courts have found that specific sections of the UMTA imply a private right of action.

(Citations and footnote omitted.)[3] *Ettinger,* supra at 865.

Although Brooks-Powers argues otherwise, neither *Ettinger* nor the two other cases she cites provides support for he proposition that the survivors of an employee killed on the job can assert a private right of action. See *United Handicapped Federation v. Andre,* 558 F.2d 413 (8th Cir. 1977); *Stavisky v. Metropolitan Transp. Auth.,* 533 F.Supp. 1146 (E.D.N.Y. 1982). First, neither *Ettinger* nor the other cases cited by Brooks-Powers involves a conflict between UMTA and state law. Second in resolving whether a federal statute overrides long-standing state law, we must consider the principle of preemption.

"The issue of federal preemption of state law is fundamentally a question of Congressional intent" (Citations and punctuation omitted.) *Macon-Bibb Counter Hosp. Auth. v. Nat. Treasury Employees Union,* 265 Ga. 557, 558(2), 458 SE2d 95 (1995). A plaintiff who asserts the existence of an implied right of action bears the burden of establishing that proposition. See generally *Noe v MARTA*, 644 F.2d 434, 439 (5th Cir.1981). But Brooks-Powers has cited no provision in the UMTA, and we have found none, that shows that Congress expressly intended to preempt state workers'

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3 In note 3, the district court observed that mobility-handicapped individuals and associations of disabled persons have standing to bring a private cause of action when the urban mass transit equipment purchased with federal funds is not fully accessible to all handicapped persons. Id. at 565, 543 S.E.2d 733.

compensation laws and authorize an injured worker or his heirs to file a private right of action in these circumstances.
As to an implied right, in *Cort v. Ash,* 422 U. S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975*)*, the Supreme Court set forth several criteria for deciding whether an implied right exists.
In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff `one of the class for whose especial benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?
(Citations omitted.) *Id.* at 78, 95 S.Ct. 2080.

Among the five stated purposes of the UMTA, nothing reflects a congressional intent to create a remedy for employees injured on-the-job- Congress listed the general purposes as being:

> (1) to assist in developing improved mass transportation equipment, facilities, techniques and methods...; (2) to encourage the planning and establishment of area wide urban mass transportation systems ...; (3) to assist States and local governments and their authorities in financing area wide mass transportation systems ...; (4) to provide financial assistance ... to help carry out national goals related to mobility for elderly individuals, individuals with disabilities, and *economically* disadvantaged

> individuals; and (5) to establish a partnership that allows a community, with financial assistance from the Government, to satisfy its urban mass transportation requirements. 49 USC § 5301(f).

Similarly, Brooks-Powers' reliance upon 49 USC § 5329 of the UMTA, entitled "Investigation of safety hazards," is misplaced. That section merely authorizes the Secretary of Transportation to investigate safety hazards and requires the Secretary to report safety hazards to Congress. In its entirety, § 5329 consists of two subsections. Subsection (a) authorizes the Secretary of Transportation to

> investigate a condition in equipment, a facility, or an operation Financed under this chapter [49 USCS §§ 5301 et seq.] that the Secretary believes causes a serious hazard of death or injury to establish the nature and extent of the condition and how to eliminate or correct it. If the Secretary establishes that a condition causes a hazard, the Secretary shall require the local governmental authority receiving amounts under this chapter ... to submit a plan for correcting it. The Secretary may withhold further financial assistance under this chapter ... until a plan is approved and carried out.

Subsection (b) requires the Secretary to submit a report to Congress not later than June 15, 1992, that includes information on seven topics including, "(3) a summary of all passenger-related deaths and injuries resulting from an unsafe condition in a facility, equipment or way of operating a facility or equipment at least partly financed, under this chapter," and "(4) a summery of all employee-related deaths and injuries; resulting from an unsafe condition in a facility, equipment, or way of operating a facility or equipment at

least partly financed under this chapter." Subsection (b) (5) requires the Secretary to submit "a summary of action of the Secretary to correct or eliminate the unsafe condition to which the deaths and injuries referred to in clauses (3) and (4) of this subsection were attributed." 49 USC § 5329(b)(5). Although § 5329 does pertain to safety investigations, nothing in the statute implies a right to bring an individual lawsuit.

Nor does 49 USC § 5330, titled "[w]ithholding amounts for noncompliance with safety requirements," imply a private right of action. Instead, it authorizes the Secretary of Transportation to withhold up to five percent of appropriated funds is the event that a state fails to properly establish and carry out a safety program. See 49 USC § 5330(b)-(c).

Moreover, the cause of action for a workplace injury is one traditionally relegated to state law, making it inappropriate to infer a cause of action based solely on federal law. Had Congress intended to allow transit workers to sue outside of workers' compensation systems, it could have authorized suit under the Federal Employers' Liability Act ("FELA"), 45 USC § 51 et seq. Under FELA, Congress decided to supersede state law remedies in the subject area covered by FELA, so that FELA provides the exclusive remedy for employees of common carriers injured by the negligence of their employers. *Key v. Norfolk Southern R.*, 228 Ga. App. 305, 306, 491 SE2d 511 (1997). But urban rapid transit systems like MARTA are exempted from FELA. See *Felton v. Southeastern Pennsylvania Transp. Auth.*, 952 F.2d 59, 66 (3rd Cir. 1991); see also *Chicago Transit Auth. v. Flohr*, 570 F.2d 1305, 1311 (7th Cir. 1977).

Brooks-Powers' reliance upon certain sections of the Code of Federal Regulations as evidence of intent is misplaced. The CFR is a "codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government."[4] As such, it is not authority for ascertaining congressional intent. By their plain terms, the UMTA and CFR provide for executive review of the performance of state safety agencies. As 49 CFR §.6591 provides: "This part implements 49 U.S.C. 5330 by requiring a State to oversee the safety of rail fixed guideway systems through a designated oversight agency." The UMTA and the implementing rules appearing in the CFR authorize the Secretary, to withhold a percentage of federal funds for non-compliance with safety regulations, to require an oversight agency to conduct an annual audit and perform a safety review every three years, and to require transit systems to report hazardous conditions. See 49 USC §§ 5329-5330; 49 CFR §§ 659.7, 659.35, 659.37, 659.39. But while UMTA provides some federal oversight and regulation of entities accepting federal funds for mass transit systems, it does not imply an individual right to sue in them circumstances. Since Brooks-Powers failed to meet the burden under *Cort,* supra and its progeny, the trial court did not err in finding that Brooks-Powers did not have a private right of action under the UMTA to sue MARTA.

2. Brooks-Powers contends that the trial court erred by granting summary judgment because the record includes evidence showing "that MARTA failed to enact and implement a safety program adequate to ensure the safety of its employees in violation of (the] due process rights of' Powers.

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[4] The official explanation appears on page v of 49 CFR Parts 400 to 999.

Neither the U. S. Supreme Court nor the Georgia Supreme Court recognizes an independent substantive due process right to a safe working environment separate an beyond the framework of workers' compensation laws. *See Collins v. City of Harker Heights,* 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Southern Wire & Iron v. Fowler,* 217 Ga. 727, 731, 124 S.E.2d 738 (1962) (employee's sole remedy is the Workers' Compensation Act even when employer willfully fails to furnish K s employee with a safe place to work).

The facts in *Collins,* supra, are remarkably similar to this case and Brooks-Powers' effort to distinguish *Collins* is unpersuasive. In *Collins,* the widow of a city worker killed in an on-the-job accident brought an action against the city under 42 USC § 1983. She alleged that her husband "had a constitutional right to be free from unreasonable risks of harm... and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.'" Id. at 117. The U. S. Supreme Court disagreed, holding:

> Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause. The Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression.
> (Citations and punctuation omitted.) *Collins,* supra at 126, 112 S.Ct.1061.

The Supreme Court determined that the city's purported breach of its duty of care to Mr. Collins by failing to provide a safe work environment did not violate the Due Process Clause. Id. at 128, 112 S.Ct.1061.

Brooks-Powers' reliance upon *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) is misplaced, because that case provides legal support for MARTA's argument. Philip Lewis was killed during a high-speed automobile chase by a police officer attempting to apprehend a suspect.[5] After Lewis's tragic death, his parents and the representatives of his estate brought state law claims against the county and also alleged a claim under 42 USC § 1983, alleging a. deprivation of the decedent's Fourteenth Amendment substantive due process right to life. *Lewis,* supra at 837, 118 S.Ct. 1708. The U.S. Supreme Court concluded, "Regardless whether [the pursuing officer's) behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983." Id. at 855, 118 S.Ct. 1708. Similarly, here, the conduct of MARTA, while arguably negligent, did not constitute deliberate behavior "intended to injure in some way unjustifiable by any government interest." Id. at 849, 118 S.Ct. 1708. The assertion of a deprivation of substantive due process under these facts is therefore not sustainable. See *Ga. Dept. of Human Resources v. Joseph Campbell Co.,* 261 Ga. 822, 823-824(3), 411 S.E.2d 871 (1992) (grant of immunity given to employers in the state workers' compensation act does not

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[5] The Supreme Court noted, "We granted certiorari ... to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." Id. at 839, 543 S.E.2d 733.

violate the due process and equal protection provisions of the state and federal constitutions).

3. Brooks-Powers asserts that the trial court erred by ignoring MARTA's admission in judicio of certain assertions regarding the intent and purpose of the UMTA. She argues that the court erred in finding that MARTA's responses were not binding and overlooked the evidentiary value of those admissions.

At the motion hearing, MARTA sought to amend its response to two paragraphs of the complaint that related to the UMTA. Paragraph 48 of the complaint alleged in part, "Congress enacted the Urban Mass Transportation Act for the purpose of protecting the rights and safety of rail transit workers, such as" Powers. Paragraph 49 alleged that the UMTA "was designed to improve the safety and security of mass rail transportation systems as a result of a growing concern of Congress to prevent catastrophic accidents involving the employees and passengers of rail transportation systems." After admitting the allegations in both paragraphs, MARTA sought to deny them.

Brooks-Powers objected. The trial court found that the admissions concerned "an opinion regarding the purpose of a certain law" and were not admissions in judicio. See *Health Horizons v. State Farm Mut. Ins. Co.*, 239 Ga. App_ 440, 446(a), 521 S.E.2d 383 (1999). We agree.

Since the admissions at issue represented opinions about law, no error occurred in permitting MARTA to amend its answer. See *Walker Y. Jack Eckerd Corp.*, 209 Ga. App. 517,518(1), 434 S.E.2d 63 (1993) (admissions in judicio are admissions of fact, not those that are merely the opinion or conclusion of

the pleader as to law or fact). Although Brooks-Powers claims that the trial court erred by "ignoring" MARTA's initial responses and failed to accord them the evidentiary value required by law, tie court did not err in allowing MARTA to amend its answer. Moreover, MARTA's understanding of the purpose of the UMTA would not necessarily have accurately reflected congressional intent. As the trial court pointed out, "the purposes of the statute are the purposes of the statute and they're listed.... The fact that they're admitted or denied doesn't change what the purposes are." No error has been shown.

Judgment affirmed. Eldridge and Ellington, JJ., concur.

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JEAN BROOKS-POWERS, as the sole surviving spouse and Administratrix of the Estate of her deceased husband, JOHN WALTER POWERS,	*	
Plaintiff,	*	
V.	*	CIVIL ACTION FILE NO: 2002CV47540
METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,	*	
Defendant.	*	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on May 31, 2002 on Defendant's Motion for Summary Judgment.

As an initial matter, the Court considers the issue regarding certain admissions made in Defendant's original answer. Defendant now seeks to amend its answer,, and Plaintiff objects. The Court fords that the subject of these admissions concerns an opinion regarding the purpose of a certain law. As such, the Court fords these claims are not binding on Plaintiff. *Health Horizons Inc. v. State Farm*

Mutual Ins. Co., 239 Ga. App. 440, 521 S.E.2d 383 (1999) (admissions in judicio apply only to admissions of fact and do not apply when the admission is merely the opinion of the pleader).

Furthermore, the Court agrees with Defendant's arguments that the purposes of UMTA do not include an implied right of action for the Plaintiff. Also, the Court rejects Plaintiff's argument that the deceased's substantive due process rights were violated by MARTA. *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S.Ct. 1061 (1992).

After carefully considering the arguments and submissions of the parties, it is hereby ordered that said motion be GRANTED.

SO ORDERED this [13TH] day of [June] 2002.

/s/
DORIS L. DOWNS, JUDGE
FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

Edward T. M. Garland
David E. Tuszynski
Sam L. Starks
3151 Maple Drive
Atlanta, Georgia 30305

Robert J. Routman
Sixth Floor
2424 Piedmont Road, N.E.
Atlanta, Georgia 30324-3330

Walter B. McClelland
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10th Floor
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APPENDIX C

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: July 14, 2003

Case No. S03C1101

JEAN BROOKS-POWERS et al. v. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY

COURT OF APPEALS CASE NO. A02A2448

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

APPENDIX D

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JEAN BROOKS-POWERS, as the sole surviving spouse and Administratrix of the Estate of her deceased husband JOHN WALTER POWERS	:	
Plaintiff,	:	Civil Action
vs.	:	File No. 2002CV47540
METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY ("MARTA")	:	
Defendant.	:	

COMPLAINT FOR DAMAGES

COMES NOW JEAN BROOKS-POWERS, as the sole surviving spouse and Administratrix of the Estate of her deceased husband, JOHN WALTER POWERS, and hereby files this Complaint pursuant to 42 U.S.C. § 1983 for the wrongful death of JOHN WALTER POWERS.

INTRODUCTION

This is a cause of action filed pursuant to 42 U.S.C. § 1983 alleging violations of the rights of JOHN WALTER POWERS, as secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and

federal laws and regulations. Section 1983 provides a vehicle for civil actions involving the deprivation of federal constitutional rights and provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

PARTIES AND JURISDICTION

1.

Defendant METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY (sometimes referred to hereinafter as "MARTA") is a person within the meaning of 42 U.S.C. § 1983.

2.

Defendant METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY is subject to the jurisdiction and venue of this Court and conducts business in the state of Georgia with its principal place of business at 2424 Piedmont Road, N.E., Atlanta, Fulton County, Georgia 30324.

3.

Defendant METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY is a resident of Fulton County, Georgia and may be served pursuant to O.C.G.A. § 9-11-4 by delivering a copy of the Summons and Complaint to its designated agent of service, Michael J. Sloan, whose address is 2424 Piedmont Road, N.E., Atlanta, Georgia 30324.

STATEMENT OF PLAINTIFF'S CLAIMS

4.

On February 25, 2000, MARTA employed JOHN WALTER POWERS and Raymond Taylor as Automatic Train Control technicians.

5.

On February 25, 2000, JOHN WALTER POWERS and Raymond Taylor were assigned by MARTA to perform track inspections at MARTA'S Avondale Station to correct a track that was out of service at that station.

6.

Prior to beginning their work on the tracks at the Avondale Station, JOHN WALTER POWERS requested and received the necessary authorization and clearance for him and Raymond Taylor to begin their work on the tracks at the Avondale Station. See Transcript of 2/25/00 E/W Radio Frequency, attached hereto as Exhibit A.

7.

While JOHN WALTER POWERS and Raymond Taylor were working on the tracks at the Avondale Station, they were struck by a MARTA train estimated to be traveling at 25 miles per hour. See Photographs from accident scene, attached hereto as Exhibit B.

8.

The force and impact of this collision resulted in the death of JOHN WALTER POWERS, who was run over and crushed by this train, as he was working on the tracks, while Raymond Taylor was critically injured and suffered from a partial amputation of a foot, a broken knee, punctured and collapsed lung, broken vertebra and a head injury.

9.

Jennifer Armour, the train operator driving the train that killed JOHN WALTER POWERS and severely injured Raymond Taylor, provided numerous statements to investigators relating to this accident.

10.

Ms. Armour reported that as the train was moving forward she saw JOHN WALTER POWERS and his co-worker on the tracks prior to the accident and can "remember putting my hands over my eyes because it's as if I wasn't, I saw what I saw but I didn't want to believe what I saw." See Transcript of Jennifer Armour Interview by Incident Investigation Board on March 21, 2000, pages 5-6, 11-12, 22, attached hereto as Exhibit C.

11.

Ms. Armour reported that she could not "remember why I would not have seen those people. I don't know, I don't remember if I was looking at something." See Transcript of Jennifer Armour Interview by Incident Investigation Board on March 21, 2000, pages 11-12, attached hereto as Exhibit C.

12.

Ms. Armour reported that at the time of this accident she applied the brakes to stop the train by switching the

master control selector switch to off, instead of braking by dumping that train, contrary to her training at MARTA. See Transcript of Jennifer Armour Interview by Incident Investigation Board on March 21, 2000, page 7, attached hereto as Exhibit C.

13.

Ms. Armour reported that she did not have time to sound the train's horn because of the distance between her and the subjects. See Statement of Jennifer Armour taken by Sgt. Fredrick Foster, attached hereto as Exhibit D.

14.

Ms. Armour reported to investigative officials that she received no notice prior to the accident that individuals were conducting inspections on the railway at the Avondale Station: "I was not told of an interlocking inspection being done at Avondale as I approached the interlocking before the accident occurred." See Report of Interview with Jennifer Armour dated March 14, 2000, attached hereto as Exhibit E.

15.

Ms. Armour reported that she received no notice of any restrictions that were in effect at the Avondale Station regarding the operation of her train through that station: "There were no restriction[s] in effect that I was aware of when the accident happened." See Report of Interview with Jennifer Armour dated March 14, 2000, attached hereto as Exhibit E.

16.

Ms. Armour reported that MARTA did not follow its normal procedure of notifying train operators when individuals are working on the tracks: "There were no

instruction out and I had not been notified by MARTA that people would be working on the track in that area. Normally if people are working on the track, MARTA will put out instruction to that effect, that people are working on the track in an area." See Report of Interview with Jennifer Armour dated March 14, 2000, attached hereto as Exhibit E.

17.

Ms. Armour reported during one interview with investigators concerning this incident that prior to the accident she remembers hearing that personnel were working on the tracks at the Avondale Station, but then remembers that the last thing she heard is that these workers were "clear of the yard." See Transcript of Jennifer Armour Interview by Incident Investigation Board on March 21, 2000, page 9, attached hereto as Exhibit C.

18.

At the time of this accident, Ms. Armour had been working for MARTA for nearly 13 years. Ms. Armour began her career with MARTA on June 22, 1987, as a part-time bus operator and was promoted to the position of full-time bus operator on August 26, 1989. Ms. Armour was promoted to the position of train operator on December 4, 1992 and was re-certified as a train operator in September 1999.

19.

As a MARTA bus-operator, Ms. Armour was involved in at least five different accidents involving the negligent operation of her MARTA bus.

20.

On November 11, 1989, Ms. Armour was suspended for operating her bus on an undesignated road and crashing

into a brick wall. See Incident Report attached hereto as Exhibit F.

21.

On April 26, 1990, Ms. Armour was suspended for hitting a car while operating her MARTA bus. MARTA rated this accident as preventable and suspended Ms. Armour for two days for being involved in excessive preventable accidents. See Incident Report attached hereto as Exhibit G.

22.

On September 13, 1991, Ms. Armour was suspended for two days after her second preventable accident involving her bus within a twelve-month period. See Disciplinary Report attached hereto as Exhibit H.

23.

On June 3, 1992, Ms. Armour received a written reprimand for driving her bus in a reckless manner after hitting a curb. See Incident Report attached hereto as Exhibit I.

24.

As a MARTA train operator, Ms. Armour was involved in at least six different incidents involving her operation of a MARTA train.

25.

On January 29, 1993, Ms. Armour was warned for taking an incorrect route on her train. See Supervisor's Report attached hereto as Exhibit J.

26.

On January 15, 1994, Ms. Armour was suspended for three days for violating a red signal. In a letter addressing Ms. Armour suspension without pay, a supervisor described this infraction as "one of the most serious offenses that a Rail Operator can commit." This supervisor explained that "going past a red signal could be a life or death situation." See Supervisor's Report attached hereto as Exhibit K.

27.

On January 20, 1995, Ms. Armour was disciplined for passing a red signal while operating her train. See Incident Report attached hereto as Exhibit L.

28.

In July of 1996 and again on October 7, 1996, Ms. Armour was disciplined for violating red signals while operating her train. See Incident Report attached hereto as Exhibit M.

29.

On or about March 6, 1998, Ms. Armour was suspended for two days for violating safety rules as a result of driving her train through a restricted area at a high rate of speed. In a description of this incident, a worker explained that Ms. Armour drove her train through an area where personnel were working without slowing down or stopping. This worker stated that Ms. Armour's conduct during this incident could have been "very dangerous" and "deadly." See Incident Report attached hereto as Exhibit N.

30.

Following this incident, MARTA notified the Georgia Department of Transportation's Rail Safety Oversight

agency, the National Transportation Safety and the Federal Transit Administration, as required by state and federal law.

31.

MARTA appointed an ad hoc- Accident Investigative Board (hereinafter "Investigative Board") to investigate this accident.

32.

The Investigative Board concluded in its report that the Operator Certification Manual "does not state that a train should be stopped in the manner in which the operator (Jennifer Armour) did by switching the manual controller to the off position." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 12, attached hereto as Exhibit O.

33.

The Investigative Board concluded that at the time of this accident MARTA had no written safety procedures at the time of the accident regarding the type of inspections being conducted by JOHN WALTER POWERS and Raymond Taylor: "No written procedure could be found for performing interlocking inspections on the wayside, nor is it apparently written that one person performs an inspection while the other watches for trains, although this is in fact practiced." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 12, attached hereto as Exhibit O.

34.

The Investigative Board concluded that at the time of this accident, MARTA did not require its train operators to have notice of restrictions regarding the presence of workers on or about the track area: "[T]he only notification the train

operators have of these restrictions is if they hear the above radio transmissions and act upon them on their own initiative. The trains will be operating in an automatic mode at normal speed and the operator is required in most locations to sound horn." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 12, attached hereto as Exhibit O.

35.

MARTA has a written policy which requires that "[t]rain operators must be alert and maintain a constant visual check of the trackway conditions as far ahead as possible and that they will not start the movement of a train from a station platform before making a visual check of the immediate track area." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 12, attached hereto as Exhibit O.

36.

MARTA has a policy that "[e]mployees must use extreme caution and be prepared to stop short of any obstruction when operating a train or vehicle in the yard area." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 12, attached hereto as Exhibit O.

37.

The Investigative Board found that "the sun was not in the operator's eyes and in no way obstructed vision." Furthermore, it was concluded that "the train operator had a clear, virtually unobstructed view from Avondale Station to the accident site," except for maybe a "split second where the accident site is partially obstructed" by a chain link fence. Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 14, attached hereto as Exhibit O.

38.

On May 26, 2000, MARTA terminated Ms. Armour, explaining in a letter to her that "your conduct has been determined to be a contributing factor to an extremely serious accident, and as your work record reflects prior safety violations, your employment with MARTA is terminated, effective immediately." See MARTA Letter to Ms. Armour dated May 26, 2000, attached hereto as Exhibit P.

39.

The Investigative Board recommended that MARTA "[c]larify the procedure for Wayside Access-Inspections so that all personnel performing such inspections are aware that one person is to perform flagperson duties and only watch for approaching trains." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 15, attached hereto as Exhibit O.

40.

The Investigative Board recommended that MARTA "[i]mprove supervision of train operators, especially regarding attentiveness" and that MARTA should "immediately" began to "[r]e-instruct train operators on the correct way to stop a train in an emergency." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 16, attached hereto as Exhibit O.

41.

The Investigative Board recommended that MARTA "[d]etermine those areas where it is difficult for train operators to see personnel on the wayside and implement special procedures as appropriate, up to and including the full, track out of service flagging procedure." Report of the

ad hoc ACCIDENT INVESTIGATION BOARD, Page 16, attached hereto as Exhibit O.

42.

The Investigative Board recommended that MARTA "[c]reate an annual wayside access re-certification course for all personnel issued either a blue or orange wayside access permit and a database to track who needs retraining and the issuing of permits." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 16, attached hereto as Exhibit O.

43.

The Investigative Board recommended that MARTA "[d]etermine what is a reasonable number of hours of time off between shifts" and "[s]trictly enforce whatever is determined." The Investigative Board also recommended that MARTA "educate employees on fatigue and fatigue countermeasures." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 16, attached hereto as Exhibit O.

44.

The Investigative Board recommended that MARTA "[t]thoroughly review the existing rail operating rules and procedures for adequacy, currency, and completeness." The Investigative Board noted in its report that a "contract had been awarded to Interactive Elements, Inc. to accomplish this task prior to this accident." Report of the ad hoc ACCIDENT INVESTIGATION BOARD, Page 16, attached hereto as Exhibit O.

45.

On April 10, 2000, less than one month after JOHN WALTER POWERS was run over and killed by a MARTA train, a father and a son working as contractors for MARTA were killed by a MARTA train while working at the Lenox Station. See Incident Report attached hereto as Exhibit Q.

46.

Newspaper accounts of these accidents reveal that "MARTA officials were warned in September [1999] that their employees' safety was compromised by outdated procedures, a caution delivered months before trains killed three workers and seriously injured another." See Atlanta Journal-Constitution article entitled "MARTA deaths preceded by warnings" from Wednesday, April 12, 2000, and other newspaper articles attached hereto as Exhibit R.

VIOLATION OF THE URBAN MASS TRANSPORTATION ACT

47.

The allegations contained in Paragraphs 1 through 46 above are hereby incorporated by reference, as if fully stated herein.

48.

Congress enacted the Urban Mass Transportation Act for the purpose of protecting the rights and safety of rail transit workers, such as JOHN WALTER POWERS, and passengers in states and localities receiving funds from the federal government to maintain and operate its mass rail transportation systems. See 42 U.S.C. §§ 5329, 5330; 49 CFR Part 659, attached hereto as Exhibit S.

49.

The Urban Mass Transportation Act was designed to improve the safety and security of mass rail transportation systems as a result of a growing concern of Congress to prevent catastrophic accidents involving the employees and passengers of rail transportation systems. See 42 U.S.C. §§ 5329, 5330; 49 CFR Part 659, attached hereto as Exhibit S.

50.

MARTA receives funds from the federal government to operate its rail transit system and is therefore subject to the policies, regulations and provisions of the Urban Mass Transportation Act.

51.

MARTA was not in compliance with the policies, provisions and regulations of the Urban Mass Transportation Act at the time of the events giving rise to the death of JOHN WALTER POWERS. See 42 U.S.C. §§ 5329, 5330; 49 CFR Part 659, attached hereto as Exhibit S.

52.

MARTA's failure to comply with the security and safety policies, provisions and regulations of the Urban Mass Transportation Act was the direct and proximate result of the death of JOHN WALTER POWERS.

FOURTEENTH AMENDMENT
DUE PROCESS VIOLATIONS

53.

The allegations contained in Paragraphs 1 through 52 above are hereby incorporated by reference, as if fully stated herein.

54.

MARTA has an obligation based on state and federal constitutional, statutory and regulatory laws to ensure that it has adequate policies and procedures to ensure the safety of its employees and passengers.

55.

MARTA knew and should have known that Jennifer Armour was not qualified and capable of performing as a rail operator without jeopardizing the lives and safety of MARTA employees and passengers, but MARTA promoted Ms. Armour to the position of rail operator even though Ms. Armour had a history of committing numerous and repeated safety violations while working as a MARTA bus operator.

56.

MARTA knew and should have known that Jennifer Armour was not qualified and capable of performing as a rail operator, without jeopardizing the lives and safety of MARTA workers and passengers, but instead MARTA authorized and permitted Ms. Armour to operate a MARTA train, putting at risk the safety of MARTA employees and passengers.

57.

MARTA knew and should have known that Jennifer Armour was not qualified and capable of performing as a rail operator without jeopardizing the safety of MARTA workers and passengers, yet failed to provide her with adequate training to ensure the safety of MARTA employees and passengers.

58.

By failing to take appropriate action to ensure that Jennifer Armour was competent and capable to perform as a rail operator without putting at risk the lives and safety of MARTA employees and passengers, MARTA'S conduct is so egregious and outrageous and shows a deliberate indifference and callous disregard for the state and federal constitutional and statutory rights of JOHN WALTER POWERS, including his Fourteenth Amendment right not to be deprived of his life or liberty without due process of law, in violation of 42 U.S.C. § 1983.

59.

MARTA knew and should have known that its safety policies and procedures in existence at the time of the accident that caused the death of JOHN WALTER POWERS and injuries to Raymond Taylor were not in compliance with its responsibilities under state and federal constitutional, statutory and regulatory law. See Preliminary Audit Report, dated April 1, 1998, attached hereto as Exhibit T.

60.

MARTA knew and should have known that its safety policies and procedures in existence at the time of the accident that caused the death of JOHN WALTER POWERS and injuries to Raymond Taylor, were outdated, inadequate and not appropriate to ensure the safety of MARTA employees and passengers. See Analysis of MARTA Rail Operating Rules and Procedures, attached hereto as Exhibit U.

61.

By failing to enact and implement policies and procedures adequate to ensure the safety of its employees and

passengers, as required by state and federal constitutional, statutory and regulatory law, MARTA'S conduct was so egregious and outrageous that it amounted to a deliberate indifference and callous disregard for the state and federal constitutional and statutory rights of JOHN WALTER POWERS, including his Fourteenth Amendment not to be deprived of his life or liberty without due process of law, in violation of 42 U.S.C. § 1983.

ATTORNEYS' FEES

62.

The allegations contained in Paragraphs 1 through 61 of above are hereby incorporated by reference, as if fully stated herein.

63.

Plaintiff has suffered damages due to the violations of the constitutional rights of JOHN WALTER POWERS and is entitled to compensation pursuant to 42 U.S.C. § 1983.

64.

Pursuant to 42 U.S.C. § 1988, MARTA is liable to Plaintiff for attorneys' fees incurred by Plaintiff in vindicating his legal rights.

PUNITIVE DAMAGES

65.

The allegations contained in Paragraphs 1 through 64 above are hereby incorporated by reference, as if fully stated herein.

66.

Based on MARTA'S conscious indifference to the life and safety of its employees, JOHN WALTER POWERS and Raymond Taylor, as described above, and MARTA'S indifference to the consequences of their actions and omissions, MARTA is liable to Plaintiff for punitive damages to punish and deter any such similar conduct in the future.

DEMAND AND PRAYER FOR RELIEF

Based on the foregoing, Plaintiffs pray for the following relief:

(a) That the Court enter judgment in favor of Plaintiff JEAN BROOKS-POWERS against Defendant MARTA for violations of JOHN WALTER POWERS' constitutional and statutory rights, and award damages for JOHN WALTER POWERS' pain and suffering, funeral and burial expenses, and medical expenses, and for the full value of the life of JOHN WALTER POWERS had he lived;

(b) That the Court enter judgment in favor of Plaintiff against Defendant, pursuant to O.C.G.A. § 51-12-5.1, for punitive damages in an amount sufficient to deter, penalize and/or punish Defendant in light of the circumstances of this case;

(c) That the Court enter judgment in favor of Plaintiff for attorneys' fees, pursuant to 42 U.S.C. §1988;

(d) That the Court enter judgment in favor of Plaintiff for the costs of litigation;

(e) A trial by jury; and

(f) That the Court grant Plaintiff such other legal or equitable relief as the Court deems just and proper under the circumstances, including requiring MARTA to implement an effective safety program in accordance with the Urban Mass Transportation Act. See 42 U.S.C. § 5329, 5330; 49 CFR Part 659.

Respectfully submitted,
GARLAND, SAMUEL & LOEB, P.C.

BY: /s/
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APPENDIX E

Constitutional, Statutory and Regulatory Provisions Involved

1. United States Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. 1983:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory

decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. The Urban Mass Transportation Act, 49 U.S.C. 5301 *et seq*:

A. 49 U.S.C. 5301:

§ 5301. Policies, findings, and purposes

(a) Development of transportation systems.--It is in the interest of the United States to encourage and promote the development of transportation systems that embrace various modes of transportation and efficiently maximize mobility of individuals and goods in and through urbanized areas and minimize transportation-related fuel consumption and air pollution.

(b) General findings.--Congress finds that—

(1) more than 70 percent of the population of the United States is located in rapidly expanding urban areas that generally cross the boundary lines of local jurisdictions and often extend into at least 2 States;

(2) the welfare and vitality of urban areas, the satisfactory movement of people and goods within those areas, and the effectiveness of programs aided by the United States Government are jeopardized by deteriorating or inadequate urban transportation service and facilities, the intensification of traffic congestion, and the lack of coordinated, comprehensive, and continuing development planning;

(3) transportation is the lifeblood of an urbanized society, and the health and welfare of an urbanized society depend on

providing efficient, economical, and convenient transportation in and between urban areas;

(4) for many years the mass transportation industry capably and profitably satisfied the transportation needs of the urban areas of the United States but in the early 1970's continuing even minimal mass transportation service in urban areas was threatened because maintaining that transportation service was financially burdensome;

(5) ending that transportation, or the continued increase in its cost to the user, is undesirable and may affect seriously and adversely the welfare of a substantial number of lower income individuals;

(6) some urban areas were developing preliminary plans for, or carrying out, projects in the early 1970's to revitalize their mass transportation operations;

(7) significant mass transportation improvements are necessary to achieve national goals for improved air quality, energy conservation, international competitiveness, and mobility for elderly individuals, individuals with disabilities, and economically disadvantaged individuals in urban and rural areas of the United States;

(8) financial assistance by the Government to develop efficient and coordinated mass transportation systems is essential to solve the urban transportation problems referred to in clause (2) of this subsection; and

(9) immediate substantial assistance by the Government is needed to enable mass transportation systems to continue providing vital transportation service.

(c) Rapid urbanization and continuing population dispersal.--Rapid urbanization and continuing dispersal of the population and activities in urban areas have made the ability of all citizens to move quickly and at a reasonable cost an urgent problem of the Government.

(d) Elderly individuals and individuals with disabilities.--It is the policy of the Government that elderly individuals and individuals with disabilities have the same right as other individuals to use mass transportation service and facilities. Special efforts shall be made in planning and designing mass transportation service and facilities to ensure that mass transportation can be used by elderly individuals and individuals with disabilities. All programs of the Government assisting mass transportation shall carry out this policy.

(e) Preserving the environment.--It is the policy of the Government that special effort shall be made to preserve the natural beauty of the countryside, public park and recreation lands, wildlife and waterfowl refuges, and important historical and cultural assets when planning, designing, and carrying out an urban mass transportation capital project with assistance from the Government under sections 5309 and 5310 of this title.

(f) General purposes.--The purposes of this chapter are--
(1) to assist in developing improved mass transportation equipment, facilities, techniques, and methods with the cooperation of public and private mass transportation companies;
(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development with the cooperation of public and private mass transportation companies;
(3) to assist States and local governments and their authorities in financing areawide urban mass transportation systems that are to be operated by public or private mass transportation companies as decided by local needs;

(4) to provide financial assistance to State and local governments and their authorities to help carry out national goals related to mobility for elderly individuals, individuals with disabilities, and economically disadvantaged individuals; and
(5) to establish a partnership that allows a community, with financial assistance from the Government, to satisfy its urban mass transportation requirements.

B. 49 U.S.C. 5329:

§ 5329. Investigation of safety hazards

(a) General.--The Secretary of Transportation may investigate a condition in equipment, a facility, or an operation financed under this chapter that the Secretary believes causes a serious hazard of death or injury to establish the nature and extent of the condition and how to eliminate or correct it. If the Secretary establishes that a condition causes a hazard, the Secretary shall require the local governmental authority receiving amounts under this chapter to submit a plan for correcting it. The Secretary may withhold further financial assistance under this chapter until a plan is approved and carried out.

(b) Report.--Not later than June 15, 1992, the Secretary shall submit to Congress a report containing--
(1) a description of actions taken to identify and investigate conditions in a facility, equipment, or way of operating as part of the findings and decisions required of the Secretary in providing a grant or loan under this chapter;
(2) a description of actions of the Secretary to correct or eliminate, as a requirement for making an amount available

through a grant or loan under this chapter, a condition found to create a serious hazard of death or injury;

(3) a summary of all passenger-related deaths and injuries resulting from an unsafe condition in a facility, equipment, or way of operating a facility or equipment at least partly financed under this chapter;

(4) a summary of all employee-related deaths and injuries resulting from an unsafe condition in a facility, equipment, or way of operating a facility or equipment at least partly financed under this chapter;

(5) a summary of action of the Secretary to correct or eliminate the unsafe condition to which the deaths and injuries referred to in clauses (3) and (4) of this subsection were attributed;

(6) a summary of actions of the Secretary to alert mass transportation operators of the nature of the unsafe condition found to create a serious hazard of death or injury; and

(7) recommendations of the Secretary to Congress of any legislative or administrative actions necessary to ensure that all recipients of amounts under this chapter will undertake the best way available to correct or eliminate hazards of death or injury, including--

(A) a timetable for undertaking actions;

(B) an estimate of the capital and operating cost to take the actions; and

(C) minimum standards for establishing and carrying out safety plans by recipients of amounts under this chapter.

C. 49 U.S.C. 5330:

§ 5330. Withholding amounts for noncompliance with safety requirements

(a) Application.--This section applies only to States that have rail fixed guideway mass transportation systems not subject to regulation by the Federal Railroad Administration.
(b) General authority.--The Secretary of Transportation may withhold not more than 5 percent of the amount required to be appropriated for use in a State or urbanized area in the State under section 5307 of this title for a fiscal year beginning after September 30, 1994, if the State in the prior fiscal year has not met the requirements of subsection (c) of this section and the Secretary decides the State is not making an adequate effort to comply with subsection (c).

(c) State requirements.--A State meets the requirements of this section if the State--
(1) establishes and is carrying out a safety program plan for each fixed guideway mass transportation system in the State that establishes at least safety requirements, lines of authority, levels of responsibility and accountability, and methods of documentation for the system; and
(2) designates a State authority as having responsibility--
(A) to require, review, approve, and monitor the carrying out of each plan;
(B) to investigate hazardous conditions and accidents on the systems; and
(C) to require corrective action to correct or eliminate those conditions.

(d) Multistate involvement.--When more than one State is subject to this section in connection with a single mass transportation authority, the affected States may designate an entity (except the mass transportation authority) to ensure uniform safety standards and enforcement and to meet the requirements of subsection (c) of this section.

(e) Availability of withheld amounts.--(1) An amount withheld under subsection (b) of this section remains available for apportionment for use in the State until the end of the 2d fiscal year after the fiscal year for which the amount may be appropriated.

(2) If a State meets the requirements of subsection (c) of this section before the last day of the period for which an amount withheld under subsection (b) of this section remains available under paragraph (1) of this subsection, the Secretary, on the first day on which the State meets the requirements, shall apportion to the State the amount withheld that remains available for apportionment for use in the State. An amount apportioned under this paragraph remains available until the end of the 3d fiscal year after the fiscal year in which the amount is apportioned. An amount not obligated at the end of the 3- year period shall be apportioned for use in other States under section 5336 of this title.

(3) If a State does not meet the requirements of subsection (c) of this section at the end of the period for which an amount withheld under subsection (b) of this section remains available under paragraph (1) of this subsection, the amount shall be apportioned for use in other States under section 5336 of this title.

(f) Regulations.--Not later than December 18, 1992, the Secretary shall prescribe regulations stating the requirements for complying with subsection (c) of this section.

49 C.F.R. Part 659:

SUBPART A--GENERAL PROVISIONS

§ 659.1 Purpose. This part implements 49 U.S.C. 5330 by requiring a State to oversee the safety of rail fixed guideway systems through a designated oversight agency.

§ 659.3 Scope. This part applies to a State that has within its boundaries a rail fixed guideway system not regulated by the Federal Railroad Administration (FRA).

§ 659.5 Definitions. As used in this part—

Accident means any event involving the revenue service operation of a rail fixed guideway system if as a result:

(1) An individual dies;

(2) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or

(3) A collision, derailment, or fire causes property damage in excess of $100,000.

APTA Guidelines means the American Public Transit Association's "Manual for the Development of Rail Transit System Safety Program Plans," published on August 20, 1991.

Contractor means an entity that performs tasks required by this part on behalf of the oversight or transit agency. The transit agency may not be a contractor for the oversight agency.

FTA means the Federal Transit Administration, an agency within the U.S. Department of Transportation.

Hazardous condition means a condition that may endanger human life or property. It includes unacceptable hazardous conditions.

Investigation means a process to determine the probable cause of an accident or an unacceptable hazardous condition; it may involve no more than a review and approval of the transit agency's determination of the probable cause of an accident or unacceptable hazardous condition.

Oversight agency means the entity, other than the transit agency, designated by the State or several States to implement this part.

Rail fixed guideway system means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that is:

(1) Included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas (49 U.S.C. 5336); and

(2) Not regulated by the Federal Railroad Administration.

Safety means freedom from danger.

Safety review means a formal, comprehensive, on-site examination by the oversight agency of a transit agency's safety practices to determine whether they comply with the policies and procedures required under the transit agency's system safety program plan.

Security means freedom from intentional danger.

System safety program plan means a document adopted by the transit agency detailing its safety policies, objectives, responsibilities, and procedures.

System safety program standard means the standard developed and adopted by the State oversight agency which, at a minimum, complies with the APTA Guidelines and which addresses personal security.

Transit agency means an entity operating a rail fixed guideway system.

Unacceptable hazardous condition means a hazardous condition determined to be an unacceptable hazardous condition using the APTA Guidelines' Hazard Resolution Matrix (APTA Guidelines, checklist number 7).

§ 659.7 Withholding of funds for non-compliance.

The Administrator of the FTA may withhold up to five percent of the amount required to be apportioned for use in any State or affected urbanized area in such State under FTA's formula program for urbanized areas for any fiscal year beginning after September 30, 1997, if the State in the previous fiscal year has not met the requirements of this part and the Administrator determines that the State is not making adequate efforts to comply with this part.

SUBPART B--THE ROLE OF THE STATE

§ 659.21 Designation of oversight agency.

(a) For a transit agency or agencies operating within a single State, the State must designate an agency of the State, other than a transit agency, to serve as the oversight agency and to implement the requirements of this part.

(b) For a transit agency operating a system within more than one State, those States may designate a single entity, other than the transit agency, to implement the requirements of this part.

§ 659.23 Confidential investigation reports. The State may prohibit an investigation report that may be prepared by the oversight agency from being admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

SUBPART C--THE OVERSIGHT AGENCY'S ROLE

§ 659.31 The system safety program standard.

(a) The oversight agency must develop and adopt a system safety program standard that, at a minimum--

(1) Complies with the American Public Transit Association's "Manual for the Development of Rail Transit System Safety Program Plans" (APTA Guidelines) published on August 20, 1991, hereby incorporated by reference; and

(2) Requires the transit agency to address the personal security of its passengers and employees.

(b) The APTA Guidelines specify procedures for developing a system safety program plan, generally discuss the principles of system safety, and specifically address certain issues critical to the safe operation of a rail fixed guideway system.

(c) The incorporation by reference of the APTA Guidelines has been approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of the APTA Guidelines may be obtained from the American Public Transit Association, 1201 New York Avenue, N.W., Washington DC 20005-3917, (202) 893-4000. The Guidelines may be inspected at, and are available from the Federal Transit Administration, Office of Safety and Security, 400 7th Street, S.W., Washington, D.C. 20590, and at the Office of the Federal Register, 800 North Capitol Street, N.W., Washington, D.C.

§ 659.33 System safety program plans.

(a) Except as provided in § 659.33(b), the oversight agency must--

(1) Require the transit agency to implement, beginning on January 1, 1997, a system safety program plan conforming to the oversight agency's system safety program standard; and **(2)** Approve in writing before

January 1, 1997, the transit agency's system safety program plan.

(b) The oversight agency must--

(1) Require the transit agency to implement beginning on January 1, 1998, the security portion of its system safety program plan; and

(2) Approve in writing before January 1, 1998, the security portions of the transit agency's system safety program plan.

(c) After December 31, 1996, the oversight agency must review and approve, in writing, the transit agency's system safety program plan, as necessary, and require the transit agency to update its system safety program plan, as necessary.

(d) The oversight agency may prohibit a transit agency from publicly disclosing the security aspects of the system safety program plan.

§ 659.35 Transit agency annual audit reports. The oversight agency must—

(a) Require that the transit agency submit, annually, a copy of the annual safety audit report prepared by the transit agency as a result of the Internal Safety Audit Process (APTA Guidelines, checklist number 9); and

(b) Review the annual safety audit reports prepared by the transit agency.

§ 659.37 Safety reviews. At least every three years the oversight agency must conduct an on-site safety review of the transit agency's implementation of its system safety program plan and prepare and issue a report containing findings and recommendations resulting from that review, which, at a minimum, must include an analysis of the efficacy of the system safety program plan and a determination of whether it should be updated.

§ 659.39 Transit agency report on accidents and unacceptable hazardous conditions. The oversight agency must require that the transit agency report accidents and unacceptable hazardous conditions to the oversight agency within a specified period of time.

§ 659.41 Investigations. The oversight agency must—

(a) Establish procedures to investigate accidents and unacceptable hazardous conditions.

(b) Unless the National Transportation Safety Board has investigated or will investigate an accident, the oversight agency must investigate accidents and unacceptable hazardous conditions occurring at a transit agency under its jurisdiction.

§ 659.43 Corrective actions. The oversight agency must require the transit agency to minimize, control, correct, or eliminate any investigated hazardous condition within a time period specified by and in accordance with a corrective action plan approved by the oversight agency.

§ 659.45 Oversight agency report to the Federal Transit Administration.

(a) *Initial submissions.* Before January 1, 1997, the oversight agency must submit to FTA the following information, which must be updated as necessary:

(1) The name and address of the oversight agency;

(2) The name(s) and address(es) of the transit agency or agencies subject to the oversight agency's jurisdiction under this part; and

(3) A written description of the oversight agency's oversight program including the following information:

(i) A copy of its system safety program standard;

(ii) Its procedures or process for reviewing and approving the transit agency's system safety program plan;

(iii) Its investigatory procedures; and

(iv) Its procedures for ensuring that appropriate corrective actions have been taken by the transit agency to correct, eliminate, minimize, or control investigated hazardous conditions.

(b) *Annual submissions.* Before March 15 of each year, the oversight agency must submit to FTA a publicly available annual report summarizing its oversight activities for the preceding twelve months, including a description of the most common probable causal factors of accidents and unacceptable hazardous conditions.

(c) *Periodic submissions.* Status reports of accidents, hazardous conditions, and corrective action plans must be forwarded to the FTA upon request.

(d) *Addresses.* Reports and annual summaries must be sent to: Federal Transit Administration, Office of Safety and Security, 400 7th Street, S.W., Washington, DC 20590.

§ 659.47 Use of contractors.

(a) The oversight agency may use a contractor to--

(1) Develop a system safety program standard;

(2) Review system safety program plans;

(3) Review annual audit reports;

(4) Conduct safety reviews;

(5) Prepare safety review findings;

(6) Establish investigation procedures;

(7) Conduct investigations;

(8) Review corrective action plans; and/or

(9) Prepare initial or annual submissions to FTA.

(b) The oversight agency may allow a transit agency to use a contractor to--

(1) Develop or update a system safety program plan;

(2) Prepare annual audit reports; and/or
(3) Develop a corrective action plan.

§ 659.49 Certification of compliance.

(a) Before January 1, 1997, and annually thereafter, the oversight agency must certify to the FTA that it has complied with the requirements of this part. Each certification shall comply with the applicable sample certification provided in the appendix to this part. Each certification shall be sent to: Federal Transit Administration, Office of Safety and Security, 400 7th Street, S.W., Washington, DC 20590.

(b) Each certification must be signed by an official authorized by the oversight agency and must comply with the applicable sample certification provided in the appendix to this part.

Appendix to Part 659--Sample Certification of Compliance

This appendix contains an example of certification language.

I, (name), (title), certify that (name of the oversight agency) has implemented a State oversight program that meets the requirements of 49 CFR part 659 and further certify that I have no conflict of interest with any rail fixed guideway system overseen as a result of 49 CFR part 659, nor does (name of the oversight agency) and its contractors.

No. 03-544

IN THE

Supreme Court of the United States

JEAN BROOKS POWERS,
AS THE SURVIVING SPOUSE AND ADMINISTRATRIX OF THE
ESTATE OF HER DECEASED HUSBAND,
JOHN WALTER POWERS,

Petitioner,

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT JON ROUTMAN
Counsel of Record

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QUESTIONS PRESENTED

1.

Whether the exclusive remedy of a state workers' compensation act can be circumvented either by this Court granting an implied a private right of action under The Urban Mass Transportation Act of 1964 contrary to the Act's purposes expressed by Congress in 49 U.S.C. §5301(f) or by this Court overruling its decision in *Collins v. City of Harker Heights, Texas,* 503 U.S. 115 (1992). As posed by the Petitioner, this question was trifurcated into 1) whether an implied private right of action existed, 2) whether Congress intended to pre-empt workers' compensation, and, 3) whether due process created a separate right to sue.

2.

Whether sovereign immunity prevents tort actions for bodily injuries to employees of public authorities operating rapid transit systems when sovereign immunity is expressly waived within a state's workers' compensation act and when said bodily injuries arise out of and in the course of employment with the public authority.

RULE 29.6 STATEMENT

The Metropolitan Atlanta Rapid Transit Authority is a governmental corporation not subject to Rule 29.6. The Georgia legislature created "a public body corporate to be known as the Metropolitan Atlanta Rapid Transit Authority as a joint public instrumentality of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinett." *MARTA Act of 1965,* Ga. L. 1965, p. 2243. "MARTA, by creation and legislative enactment of the General Assembly, is a state created local public authority." *Williams v. MARTA*, 247 Ga. App. 52 (2000).

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A. Petitioner Has No Implied Right To Sue For Bodily Injuries Under UMTA. 2

1. Congress did not intend to pre-empt state workers' compensation acts. 2

2. Congress clearly stated its intent in 49 U.S.C. §5301(f). 3

3. The burden of proof required to show an implied right under federal statute is restrictive. 5

4. Congressional intent is strictly construed. 8

B. Petitioner Has No Cause Of Action Under The Due Process Clause. 9

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Metropolitan Atlanta Rapid Transit Authority ("MARTA"), respectfully requests that this Court deny the petition for a writ of certiorari on the questions as filed by Petitioner in this case.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

The Petitioner's statement of facts is accepted with clarifications. First, the Respondent Metropolitan Atlanta Rapid Transit Authority ("MARTA") disputes the statement of train operator Jennifer Armour that she was not notified that there were workers on the train tracks. Second, the facts, as recited in the Georgia Court of Appeals decision, include that a notice of claim was filed with Georgia State Board of Workers' Compensation, the injuries to the deceased were accepted as compensable under the Georgia Workers' Compensation Act, and benefits were being paid thereunder. The incident arose out of and in the course of employment.

The Georgia Workers' Compensation Act provides for what is known as the exclusive remedy provision of workers' compensation by specifically stating "[t]he rights and the remedies granted to an employee by this chapter shall **exclude all other rights and remedies** of such employee, his personal representative, parents, dependents, or next of kin, **at common law or otherwise, on account of such injury, loss of service, or death**." (emphasis added) Ga. Code Ann. §34-9-11(a) (1998) . "The rights and remedies of an employee against his or her employer for a work-related injury under the Workers' Compensation Act foreclose all other remedies at common law or otherwise for such injury, lost service or death" when a complaint pleads "a cause of action exclusively within the Workers' Compensation Act." *Kel-*

logg Company v. Pinkston, 253 Ga. App. 190, 191, 558 S.E.2d 423, 424 (2001) *cert. denied.*

The Estate of John Walter Powers is barred by the exclusive remedy provision of workers' compensation from making further claims for bodily injuries against Respondent and so too is his surviving spouse, Jean Brooks-Powers. Ga. Code Ann. §34-9-11(a), *Gulf States Ceramic v. Fenster*, 228 Ga. 400, 185 S.E.2d 801 (1971), *Ponder v. Southern Tea Co.*, 170 Ga. App. 819, 318 S.E.2d 242 (1984).

Workers' compensation systems in every state are predicated on the exclusive remedy principle. Hence, in order to sustain a cause of action against Respondent, Petitioner attempts an end run around the exclusive remedy provision by asserting an implied private right of action under the Urban Mass Transportation Act of 1964 ("UMTA"), 78 Stat. 302, 49 U.S.C. §5301 *et sequitur* and by asserting due process violations of a right to a safe work environment.

I. RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE PETITION

A. Petitioner Has No Implied Right To Sue For Bodily Injuries Under UMTA.

1. Congress did not intend to pre-empt state workers' compensation acts.

If Congress had wanted to pre-empt state workers' compensation acts to allow transit workers to sue for injuries arising out of and in the course of employment, it could have merely cited to the Federal Employers' Liability Act of 1908 ("FELA"), 35 Stat. 65, 45 U.S.C. §51, *et sequitur* when enacting the Urban Mass Transportation Act of 1964 ("UMTA"). Since Congress did not do so, the clear intent of Congress in enacting UMTA was to leave the statutory coverages unaffected. Hence commuter rail systems fall under FELA while rapid transit systems such as MARTA fall under workers' compensation. *Ferguson v. Philadelphia Transp. Co.*, 205

F.2d. 520 (3rd Cir. 1953) *cert. denied* 346 U.S. 867 (1953), *Chicago Transit Authority v. Flohr*, 570 F.2d 1305 (7th Cir. 1977), *Felton v. Southeastern Pennsylvania Transportation Authority*, 952 F.2d 59 (3rd Cir. 1991), See *Williams v. MARTA,* 247 Ga. App. 52 (2000) *cert. denied* (holding that when the Georgia legislature waived sovereign immunity it intended MARTA to be under the Workers' Compensation Act, not the Georgia Employers' Liability Act ("GELA") Ga. L. 1909, p. 160, Ga. Code Ann. §34-9-40 (1998)).

2. Congress clearly stated its intent in 49 U.S.C. §5301(f).

Petitioner claims implied rights under the Urban Mass Transportation Act of 1964 ("UMTA"). The provisions cited by the Petitioner are 49 U.S.C. §5329 and 49 U.S.C. §5330. These provisions do not provide for individual private rights to sue. They are purely regulatory agency enabling acts. 49 U.S.C. §5329(a) authorizes the Department of Transportation to "withhold further financial assistance." 49 U.S.C. §5330(b) limits the withholding to "not more than 5% of the amount required to be appropriated." Congress obviously did not intend to interfere with state workers' compensation schemes since these provisions deal purely with federal funding as the only intended remedy for agency regulatory enforcement.

The Petitioner's assertion that the purpose of Congress in passing UMTA was to provide transit workers with a way around workers' compensation is without basis. Moreover, the Petitioner's reliance on The Code of Federal Regulation as evidence of Congressional intent is wholly erroneous since the CFR is a mere promulgation by agency civil servants, not Congressional legislative history. Congress' stated intent was codified in 49 U.S.C. §5301(f) as follows:

> f) General purposes - The purposes of this chapter are –

> (1) to assist in developing improved mass transportation ...
>
> (2) to encourage ... mass transportation systems needed for economical and desirable urban development ...
>
> (3) to assist States and local governments and their authorities in financing ...
>
> (4) to provide financial assistance to State and local governments and their authorities to help carry out national goals ...
>
> (5) to establish a partnership that allows a community, with financial assistance from the Government, to satisfy its urban mass transportation requirements.

Nowhere in 49 U.S.C. §5301(f) is there any support for Petitioner's assertions.

In trying to avoid the implications of 49 U.S.C. §5301(f), the Petitioner relies on 49 U.S.C. §5329(a) which provides:

> The Secretary of Transportation **may investigate a condition** in equipment, a facility, or an operation **financed under this chapter** that the Secretary believes causes a serious hazard of death or injury to establish the nature and extent of the condition and how to eliminate or correct it. **If the Secretary establishes that a condition causes a hazard**, the Secretary **shall require** the local governmental authority receiving amounts under this chapter to submit **a plan for correcting it**. The Secretary **may withhold further financial assistance** under this chapter **until a plan is approved and carried out**. (emphasis added)

This statutory provision is incomplete in its scope. Its incompleteness self-proves the lack of congressional intent to

create a comprehensive remedy for employee injuries arising out of and in the course of employment. First, Congress did not apply this statute to the equipment, facilities or operations of MARTA financed by state funds, local sales taxes and passenger fares. Congress left out quite a bit of MARTA's operations and facilities. Second, Congress made the provision discretionary and the Secretary can pick and chose what he wants to investigate. Congress left out quite a bit of what happens. Third, the remedy is one of correction not compensation or punishment. Congress did not intend to provide recompense for injuries or to take away scarce resources from local authorities. Fourth, Congress allowed the Secretary to use his discretion to withhold further funding, in other words, to put a pause on currently federally funded purchases or construction, until a plan is in place. Congress imposed no other remedy nor intended to do so.

Moreover, 49 U.S.C. §5329 refers to passengers in §§(b)(3) and employees in §§(b)(4). Therefore, if this Court accepts Petitioner's premise that employees have an implied right to sue under UMTA and under 42 U.S.C. §1983 for deprivation of due process, then it must find that passengers do also, thus further opening the floodgates of litigation. Literally every bus fender bender and every rail station slip and fall would be a federal case.

3. The burden of proof required to show an implied right under federal statute is restrictive.

This Court has enunciated legal tests to be applied in determining whether an implied right exists. The Georgia Court of Appeals followed the correct federal analysis for the existence of an implied right to sue as previously applied by the local Circuit court to the Respondent. The Georgia Court of Appeals cited to *Noe v. MARTA*, 644 F.2d 434 (5th Cir. 1981) *cert. denied* 454 U.S. 1126. for the proposition that "[a] plaintiff who asserts the existence of an implied right of action bears the burden of establishing that proposition."

Brooks-Powers v. MARTA, 260 Ga. App. 390, 392, 579 S.E.2d 802, 805 (2003). The analysis by the Georgia Court of Appeals was guided by the analysis in *Noe v. MARTA* which explained that:

> In *Cort* [*v. Ash*, 422 U.S. 66 (1975)] the Supreme Court established a four-pronged test to be applied ...
>
> (1) Is the plaintiff a member of the class for whose special benefit the statute was created?
>
> (2) Is there any indication of legislative intent either to create or deny the remedy sought?
>
> (3) Is it consistent with the underlying statutory purposes to imply a remedy such as that sought?
>
> (4) Is the cause of action one that is traditionally relegated to state law so that it would be inapproriate to infer a cause of action based solely on federal law?
>
> ... The [*Cort*] decision was far more restrictive than earlier ones.
>
> ....
>
> In *Touche Ross* [*& Co. v. Redington*, 442 U.S. 560 (1979)] the Court enunciated its new approach, that the task of federal courts in cases such as this was limited *solely* to determining whether Congress intended to create the private right of action being asserted in a given case. Consistent with that shift in analytic framework the Court considered the first two criteria set out in *Cort* and, finding them not to be satisfied, declined to consider factors three and four.
>
> ....

> *Transamerica Mortgage Advisors, Inc. v. Lewis,* [444 U.S. 11 (1979)] continued the trend of further restricting those situations in which private actions would be implied ... the Court based its decision solely on the second factor in *Cort.*
>
> *Noe v. MARTA,* at 436-7.

Respondent now shows this Court that the Petitioner cannot meet the four standards of *Cort* as applied in *Noe v. MARTA.*

(1) First, "the protection and benefit of the party seeking such action must be the 'primary congressional goal' of the statute , or, as another has stated it, 'the plaintiff must be the primary beneficiary of the statute.'" *Noe v. MARTA* at 437. Here, Petitioner cannot show that the primary congressional goal of UMTA was to make the Petitioner the primary beneficiary of UMTA in the face of 49 U.S.C. §5301(f).

(2) "The second criteria of *Cort* is that there be an indication of legislative intent to create or deny the remedy sought." *Noe v. MARTA* at 438. There is nothing in the statute to expressly indicate Congress intended to create recompense for accident victims or to punish local authorities. When Congress exercised its discretion to chose a penalty power for the Secretary of Transportation, it eschewed recompense and punishment. Instead 49 U.S.C. §5329 allows the Secretary only to withhold additional funding for specific new projects until a correction plan is submitted.

(3) "The third factor is whether it is consistent with the underlying statutory purpose to imply a remedy such as that sought." *Noe v. MARTA* at 439. The purposes expressed by Congress in 49 U.S.C. §5301(f) are inconsistent with Plaintiff's requested remedies. It is inconsistent with UMTA to redirect society's scarce resources into punitive damages. It is inconsistent with UMTA to imply a remedy Congress specifically omitted. Congress and state legislatures created

remedies for employees of local rapid transit authorities and commuter rail authorities, *viz.*, the Federal Employers Liability Act (FELA), the Georgia Employers Liability Act (GELA), and the Georgia Workers Compensation Act. See *Williams v. MARTA*, 247 Ga. App. 52 (2000).

(4) "The fourth and final criteria is that the cause of action must not be one that is traditionally relegated to state law." *Noe v. MARTA* at 439. Clearly the claim for the wrongful death of John Powers is a traditional state law negligence tort. It is a train accident allegedly caused by negligence of the train operator and the contributory negligence of John Powers.

4. Congressional intent is strictly construed.

The Georgia Court of Appeals decision is faithful to the 11th Circuit precedent in *Local Division 732, Amalgamated Transit Union v. MARTA*, 667 F.2d 1327 (11th Cir. 1982) which provided implied rights must be strictly construed.

> Displaying what has been described as a drastic change in attitude, the Supreme Court has imposed increasingly severe restrictions on the availability of implied causes of action under federal statutes.
>
> . . . .
>
> If we are to conclude that Congress meant more than it said when it enacted a statute, we must do so on the basis that Congress actually intended to legislate as we infer ... In order for us to infer a private right of action, or federal jurisdiction, we must have before us clear evidence that Congress intended to provide such a remedy and if the legislative history provides no clear indication one way or the other, so that clear evidence of affirmative congressional intent is lacking, we cannot infer that Congress has legislated silently. (citations omitted)
>
> *Local Div. 732, ATU v. MARTA*, at 1334-5.

Petitioner cites no committee proceedings, no testimony before Congress and no Congressional debate to establish in the legislative history a congressional intent to create an implied right to sue or to pre-empt state workers' compensation acts.

B. Petitioner Has No Cause Of Action Under The Due Process Clause.

1. The exclusive remedy of workers' compensation does not violate due process under state law.

The Georgia Supreme Court has upheld the constitutionality of the Georgia exclusive remedy. The Georgia Supreme Court emphatically stated "[w]e also reject [arguments] that the immunity granted employers in the workers' compensation act violates the due process and equal protection provisions of the State and Federal constitutions." (citations omitted) *Georgia Department of Human Resources v. Joseph Campbell Company*, 261 Ga. 822, 823-4, 441 S.E.2d 871, 873 (1992). The exclusive remedy bar also applies to suits against co-workers. In that context, constitutional attacks grounded on violations of "Georgia's due process clause and Georgia's equal protection equivalent" were rejected by the Georgia Supreme Court which held the bar was "not unconstitutional for any reason alleged." *Williams v. Byrd*, 242 Ga. 80, 80-1, 247 S.E.2d 874, 875 (1978). In a challenge to the exclusive remedy bar to a loss of consortium claim, the Georgia Supreme Court held that "the claim of constitutional deprivation is without merit." *Henderson v. Hercules, Inc.*, 253 Ga. 685, 686, 324 S.E.2d 453, 454 (1985).

2. The exclusive remedy of workers' compensation does not violate due process under federal law.

The Constitution is the supreme law of the land. The exclusive remedy of workers compensation cannot bar constitutional torts. Hence this Court has distinguished state law

traditional torts of negligence from constitutional torts. This Court stated "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan,* 443 U.S. 137, 146 (1979).

When presented with a workers' compensation claim dressed up as a due process violation of an express statutory right granted by Texas, this Court preserved the exclusive remedy by simply saying the action was outside the realm of constitutional law. In the case of *Collins v. City of Harker Heights, Texas*, 503 U.S. 115 (1992) the widow of a city sanitation employee brought suit when her husband died of asphyxia after entering a manhole to unstop a sewer line in the course of his employment. The widow alleged that the husband "had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the [city's] custom and policy of not training its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at jobsites, and not providing safety warnings." *Id.* at 117. Additionally, she alleged "that a prior incident had given the city notice of the risks of entering the sewer lines and that the city had systematically and intentionally failed to provide the equipment and training required by a Texas statute." *Id.* at 118. Thus we have a fact pattern which is on point to the fact pattern in the case *sub judice.*

This Court stated "[e]ven though the city's conduct may be actionable under state law, we hold that §1983 does not apply because such conduct does not violate the Due Process Clause." *Id* at 117. Then this Court turned to the express violation of the Texas Hazard Communication Act, a safety statute, and stated: "[w]e also assume ... that the [Texas] Act created an entitlement that qualifies as a 'liberty interest' protected by the Due Process Clause. But even with these assumptions, petitioner's claim must fail for she has not alleged that the deprivation of this liberty interest was arbitrary in the

constitutional sense. The reasons why the city's alleged failure to train and warn did not constitute a [constitutional deprivation of substantive due process] apply *a fortiori* to the less significant liberty interest created by the Texas statute." (citations omitted) *Collins v. City of Harker Heights,* at 129.

This Court refused to create a substantive due process exception for a workers' compensation claim involving the express violation of a state-law safety statute specifically designed to prevent the harm that occurred. Petitioner would have this Court create a substantive due process exception for a workers' compensation claim based on an invented implied right to sue under a generally designed federal funding statute not specifically designed to prevent the harm which occurred.

3. *Prior to* Collins, *lower courts had also distinguished workers' compensation from constitutional torts.*

The Supreme Court of Idaho was faced with a similar fact pattern to the case *sub judice.* Municipal employees sued the City of Coeur D'Alene for exposure to asbestos under §1983 and the Idaho constitution. The Supreme Court of Idaho upheld the lower court's summary judgment that the suit was barred by Idaho's state workers' compensation exclusive remedy provision and that the §1983 action was barred because it was historically applied to deliberate decisions of government officials to deprive a person of life, liberty or property, not to mere negligence. *DeMoss v. City of Coeur D'Alene,* 118 Idaho 176, 795 P.2d 875 (1990).

The U.S. Court of Appeals for the District of Columbia has also ruled that using §1983 as an end run around the exclusive remedy provision failed constitutional muster: "whatever ... rights may be under state law ... [there] is no constitutional right to a safe working environment ... [therefore] failure to remedy safety problems ... is not actionable under section 1983 as a deprivation of a Fourteenth Amend-

ment liberty interest without due process of law." *Washington v. District of Columbia,* 802 F.2d 1478, 1482 (D.C. Cir. 1986).

The Second Circuit also determined to protect the integrity of the workers compensation system when faced with a due process challenge. The case of *McClary v. O'Hare,* 786 F.2d 83 (2nd Cir. 1986) is on point with the case *sub judice.* "McClary died ... in the course of his employment ... when a wire cable on a mobile truck crane being operated by a fellow employee broke ... [and] his wife, administratrix of his estate, brought suit under 42 U.S.C. §1983 ... [and] alleged the crane operator did not have a certificate of competency, contrary to N.Y. Gen. Bus. Law § 482 (McKinney 1984)." *McClary* at 84. The Second Circuit affirmed the United States District Court's dismissal. The Second Circuit noted that Mrs. McClary's complaint "attempts to elevate the claim from one sounding in state tort law to one of constitutional dimensions, under the rubric of procedural due process." *Id.* at 86. The Second Circuit quickly perceived the implications and concluded:

> ... any claim against a state or local official that sounds in tort can be pleaded, as this one is, as an 'established state procedure' case.
>
> ....
>
> Appellant claims that the exclusive remedy under state law, the Workers' Compensation Law, is inadequate because its exclusivity provisions constitute an invidious form of discrimination and deprivation of due process and equal protection of the laws by depriving employees of the right to recover damages from the employer outside of Workers' Compensation. That contention simply cannot stand. Workers' Compensation statutes, which impose liability without fault on employers' insurers with respect to claims by employees or their per-

> sonal representatives, have been substantively upheld against due process challenge time and again in the Unitied States Supreme Court. *See Crowell v. Benson,* 285 U.S. 22, 42, 52 S.Ct. 282, 289, 76 L.Ed. 598 (1932) (citations omitted). While workers' Compensation in this case may not be as fully compensatory as a suit under section 1983 would be, the federal Constitution does not set a standard so high as to require total compensation for all injuries. *See Parratt [v. Taylor]*, 251 U.S. at 543-44, 101 S.Ct. at 1916-17.
>
> . . . .
>
> As the [Supreme] Court stated in *Baker v. McCollan,* 443 U.S. 137, 146, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979), "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." We do not think that improper actions taken by employers violate an employee's substantive due process rights simply because that employer is a government official.... In sum, under these circumstances, the substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer.
>
> *McClary* at 87-89.

4. Analysis of a §1983 claim against a governmental entity.

The Georgia legislature created "a public body corporate to be known as the Metropolitan Atlanta Rapid Transit Authority as a joint public instrumentality of the City of Atlanta and the counties of Fulton, DeKalb, Cobb, Clayton and Gwinett." *MARTA Act of 1965,* Ga. L. 1965, p.2243.

"MARTA, by creation and legislative enactment of the General Assembly, is a state created local public authority." *Williams v. MARTA*, 247 Ga. App. 52 (2000). Because MARTA is a local governmental entity, it is subject to constitutional analysis as applied by this Court in *Collins v. City of Harker Heights, Texas.* The *Collins* Court stated "proper analysis requires us to separate two different issues when a §1983 claim is asserted against a municipality: [a.] whether plaintiff's harm was caused by a constitutional violation, and [b.] if so, whether the city is responsible for that violation." (citation omitted) *Collins* at 120.

a. *Petitioner's harm was not caused by a constitutional violation.*

In order to make a §1983 claim, the Petitioner must find some constitutional right that has been allegedly violated. In the case *sub judice*, as in *Collins,* two possible approaches are used by the Petitioner. 1) The Petitioner can attempt to ground the constitutional rights violation on a substantive due process right to a safe working environment secured by the 14th Amendment. 2) The Petitioner can attempt to ground the constitutional rights violation on a 14th Amendment liberty interest in a safe working environment secured by a statutory safety provision. This Court rejected both approaches in *Collins.*

(1) *There is no due process right to a safe working environment.*

This Court clearly stated "[t]he Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions.' Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm." (citations omitted) *Collins* at 129. In *Collins,* the plaintiff advanced "[1] that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or [2] that the City's 'deliberate indifference' to [Plaintiff's] safety was arbitrary

government action that must 'shock the conscience' of federal judges." *Collins* at 126. In the case *sub judice,* the Petitioner herein offers the same arguments. These arguments are doomed for the same reasons as they were in *Collins.* In *Collins* this Court stated the "[widow's] submissions that the city violated a federal constitutional obligation to provide its employees with certain minimal levels of safety and security is unprecedented." *Collins* at 127. This Court distinguished prior cases by noting that they dealt with "a duty to take care of those who have already been deprived of their liberty." *Id.* And then this Court concluded that the widow could not maintain "that the City had deprived Collins of his liberty when it made, and he voluntarily accepted an offer of employment." *Collins* at 128. In the case *sub judice,* John Powers voluntarily accepted employment with MARTA.

There is no dispute over the underlying claim of the Petitioner being a typical state law wrongful death tort. The constitutional exceptions for "deliberate indifference" and "shocks the conscience" do not apply to typical state law torts. To dispose of Petitioner's arguments that the exceptions for "deliberate indifference" and "shocks the conscience" lift a state-law tort to the level of a constitutional deprivation of rights, Respondent need only paraphrase this Court's analysis in *Collins*:

> We also are not persuaded that [MARTA's] alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. Petitioner's claim is analogous to a fairly typical state-law tort claim: [MARTA] breached its duty of care to her husband by failing to provide a safe working environment....we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.... Our refusal to

> characterize [MARTA's] alleged omission in this case as arbitrary in a constitutional sense rests on the presumption that the administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces. (citations omitted)
>
> *Collins* at 128.

The logic of *Collins* applies with equal force to Responent MARTA. MARTA's organizational structure is a "rational decisionmaking process that takes account of competing social, political and economic forces." Members of MARTA's Board of Directors are variously nominated and elected by the city, appointed by the counties, or are ex officio members by virtue of their public office. *MARTA Act of 1965,* § 6, Ga. L. 1965, p. 2243, as amended. The Board meetings are open to the public. *Id.* at § 6(h). The Board reports to each appointing governing body quarterly. *Id.* at § 6(k)(2). MARTA's contracts are open to public review. *Id.* at §9. A public hearing process is employed to set MARTA's fares (*Id.* at §9) and to set MARTA's annual budgets (*Id.* at §17).

(2) *There is no arbitrary deprivation of a liberty interest.*

In the second approach to attempting to find a constitutional violation, the Petitioner must find some due process or liberty interest violation of a statutorily granted right. Petitioner in the case *sub judice* argues that Respondent has violated Petitioner's due process rights and liberty interest by failing to provide a safe working environment secured by an implied right of private action under UMTA. This Court has already rejected both the due process and the liberty interest arguments. In *Collins*, the defendant employer had expressly violated the Texas Hazard Communication Act which provided penalties for the exact conduct of the defendant employer. This Court quickly disposed of the arguments stating:

> Finally, we reject petitioner's suggestion that the Texas Hazard Communication Act supports her substantive due process claim. We assume that the Act imposed a duty on the city to warn its sanitation employees about the dangers of noxious gasses in the sewers and to provide safety training and protective equipment to minimize those dangers. We also assume, as petitioner argues, that the Act created an entitlement that qualifies as a "liberty interest" protected by the Due Process Clause. But even with these assumptions, petitioner's claim must fail for she has not alleged that the deprivation of this liberty interest was arbitrary in the constitutional sense. The reasons why the city's alleged failure to train and warn did not constitute a constitutionally arbitrary deprivation of Collins' life apply *a fortiori* to the less significant liberty interest created by the Texas statute. (citation omitted)
>
> *Collins v. City of Harker Heights, Texas* at 129-30.

The *Collins* rationale applies *a fortiori* to the weaker claim of Petitioner in the case *sub judice.* The Petitioner *sub judice* does not rely on an express violation of a safety statute written to prevent the specific conduct alleged to the employer defendant. Instead, Petitioner asserts that there was a violation of an "implied right" in a statute generally designed to accomplish general purposes other than prevent the specific conduct alleged by Petitioner.

b. *Even if there was a constitutional violation, MARTA cannot be held responsible under §1983.*

In *Collins,* this Court clarified its prior rulings on the issue of responsibility for §1983 violations and stated "municipalities may not be held liable 'unless action pursuant to official municipal policy of some nature caused a constitutional tort.'"(citations omitted) *Collins* at 121. "[A] munici-

pality cannot be held liable under § 1983 on a *respondeat superior* theory....'[T]herefore, a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom ... inflicts the injury that the government as an entity is responsible under § 1983.'" (citations omitted) *Collins* at 121. In the case *sub judice* it is not alleged that Respondent has any official policy or custom of wrecking trains or running over employees. One worker's alleged negligence resulted in a co-worker's death.

Petitioner in the case *sub judice* attempts the same "shocks the conscience" argument that Mrs. Collins used to try and make a mere accident the official policy of a governmental entity. In *Collins,* the widow alleged the city followed, with "deliberate indifference," a custom and policy of not training its workers, not providing safety equipment and not providing safety warnings. *Id.* at 124, See also 117. However, this Court did not rule that this allegation of "deliberate indifference" was sufficient to establish a state action. Instead this Court merely assumed "for purposes of decision that the allegations in the complaint are sufficient to provide a substitute for the doctrine of *respondeat superior* as a basis for imposing liability on the city for the tortious conduct of its agents ... that assumption does not confront the question of whether the complaint has alleged a constitutional violation." *Id.* at 124. This Court then went on to find there was no constitutional violation.

In 1998 this Court further explained *Collins* by noting that "in *Collins v. Harker Heights, supra,* at 128, we said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *County of Sacramento v. Lewis,* 523 U.S. 833, 847 (1998). This Court further explained its decisions defining the constitutional sense of what is meant by "shocks the conscience." Shocks the conscience

does not refer to duties of care but to "the decencies of civilized conduct ... traditional ideas of fair play and decency ... interfer[ence] with rights implicit in the concept of ordered liberty." *Sacramento v. Lewis,* at 845-7. The case *sub judice* does not involve the constitution.

II. RESPONDENT'S QUESTION 2 INVOLVING SOVEREIGN IMMUNITY FURTHER SUPPORTS THE GEORGIA COURT OF APPEALS DECISION.

The questions as presented by the Petitioner are of no merit. However, before Petitioner's questions can be considered, the threshold question to be decided is whether the Georgia Legislature waived sovereign immunity thus allowing MARTA to be sued by employees for bodily injuries arising out of and in the course of employment. The Georgia Court of Appeals has determined that the waiver of sovereign immunity for a local rapid transit authority was conditioned on suits for bodily injury arising out of and in the course of employment being brought under workers' compensation. *Williams v. MARTA*, 247 Ga. App. 52, 542 S.E.2d 199 (2000), *cert. denied.* The Second Circuit has wrongly determined that a local rapid transit authority employee may sue in tort under FELA even though the authority is under workers' compensation. *Greene v. Long Island Railroad Company,* 280 F.3d 224 (2nd Cir. 2002) *cert. denied in Metropolitan Transportation Authority v. Greene,* No. 02-1173 (U.S. Supreme Court, May 19, 2003).

A. The Correct Test Is Whether A State Has Consented To Be Sued By Injured Workers As Enunciated In *Alden v. Maine.*

In *Alden v. Maine,* 527 U.S. 706 (1999), this Court interpreted and restated its decisions in *Parden v. Terminal Railway of Alabama Docks Dept.,* 377 U.S. 184 (1964) and

Hilton v. South Carolina Public Railways Commission, 502 U.S. 197 (1991). Those decisions were explained by *Alden* to stand for "the narrow proposition that certain States had consented to be sued by injured workers covered by FELA, at least in their own courts." *Alden* at 737-38. Thus when examining the case *sub judice* the proper analysis must first begin by answering the question whether Georgia consented to MARTA being sued in tort (under GELA or FELA) or to being sued only under workers' compensation.

B. The Court Of Appeals Of Georgia Determined That Sovereign Immunity Was Waived Only For The Purposes Of Respondent Being Sued Under Workers' Compensation.

In *Williams v. MARTA*, 247 Ga. App. 52, 542 S.E.2d 199 (2000) *cert. denied,* the Georgia Court of Appeals had to determine whether Respondent was subject to being sued for employee injuries in tort under the Georgia Employer's Liability Act ("GELA"), Ga. Code Ann. §34-7-40 *et sequitur.* GELA is a state parallel to the Federal Employer's Liability Act of 1908 ("FELA"). If MARTA were to be found subject to GELA it could also be found to be subject to FELA.

The Georgia Court of Appeals examined the Georgia Workers' Compensation Act and noted that all state and local government authorities were included under the Act by the express provisions of Ga. Code Ann. §34-9-1(3). The Court of Appeals then noted that the Georgia Legislature in creating MARTA "expressly waived sovereign and governmental tort immunity as a part of its creation." citing to the MARTA Act of 1965, Ga. L. 1965, pp. 2243, 2275, §22. The Georgia Court of Appeals then concluded:

> Thus, under OCGA 34-9-1(3), the WCA [Workers' Compensation Act] defines "employer" as the "State of Georgia and all departments, instrumentalities, and authorities thereof"; authorities are subject to workers' compensation by express legislative man-

> date. While MARTA, as a local authority, is expressly excluded from sovereign immunity and governmental immunity, such waiver was conditioned upon MARTA's being governed by the WCA as all other authorities. (citations omitted)
>
> *Williams v. MARTA,* at 53, 201.

Thus the precedent established by the state court of last resort is that, for employee bodily injuries arising out of and in the course of employment, Respondent has waived its sovereign immunity only for the purpose of being sued under workers' compensation. Tort claims for injuries arising out of and in the course of employment cannot be brought against Respondent under GELA and FELA. The Georgia Court of Appeals, when deciding the case *sub judice,* cited the *Williams* precedent for the proposition that Respondent MARTA was subject to workers' compensation. *Brooks-Powers v. MARTA* at 391, 804.

C. The Second Circuit Failed To Consider Waiver Of Sovereign Immunity By New York And Thus Established Erroneous Federal Precedent Affecting The Rapid Transit Industry.

The Second Circuit held that an employee of a rapid transit authority was permitted to sue the authority in tort under FELA in *Greene v. Long Island Railroad Company,* 280 F.3d 224 (2nd Cir. 2002) *cert. denied in Metropolitan Transportation Authority v. Greene,* No. 02-1173 (U.S. Supreme Court, May 19, 2003). The Second Circuit's decision is erroneous for failure to properly answer the fundamental question of whether the Metropolitan Transit Authority ("MTA") had waived sovereign immunity against tort actions by employees for bodily injuries arising out of and in the course of employment. The required analysis of *Alden v. Maine* was completely omitted by the Second Circuit.

1. Like Georgia, New York has expressly defined its public authorities as employers subject to the New York workers' compensation act.

New York has an express waiver of sovereign immunity in its workers compensation act which reads, in pertinent part: "'Employer' ... means ... the state, a municipal corporation, fire district or other political subdivision of the state, and every authority or commission heretofore or hereafter continued or created by the public authorities law." N.Y. Work. Comp. §2 (McKinney 1992). The legislature clearly manifested an unequivocal categorical inclusion of public authorities under the workers' compensation act. The MTA as a New York public authority has clearly had its sovereign immunity waived for the purposes of workers' compensation. The intent of the New York legislature is readily apparent. As in Georgia, New York has waived sovereign immunity against employee claims for bodily injury arising out of and in the course of employment on the condition that such claims be pursued under workers' compensation.

2. The error made by the Second Circuit

The Second Circuit never considered the black letter law of New York. If the Second Circuit had followed this Court's interpretation in *Alden,* it should have ruled that New York did not consent to be sued in tort by employees. The Second Circuit decision is in conflict with the correct analysis made by the Georgia Court of Appeals in *Williams v. MARTA* and followed in the case *sub judice.*

CONCLUSION

The questions presented by Petitioner in her petition for a writ of certiorari do not merit consideration. This Court should answer the threshold question on waiver of sovereign immunity by affirming the decision in the case *sub judice* based on the holding in *Williams* that MARTA waived sovereign immunity only for purposes of workers' compensation.

Respectfully submitted.

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